TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1911

No. [redacted]162

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

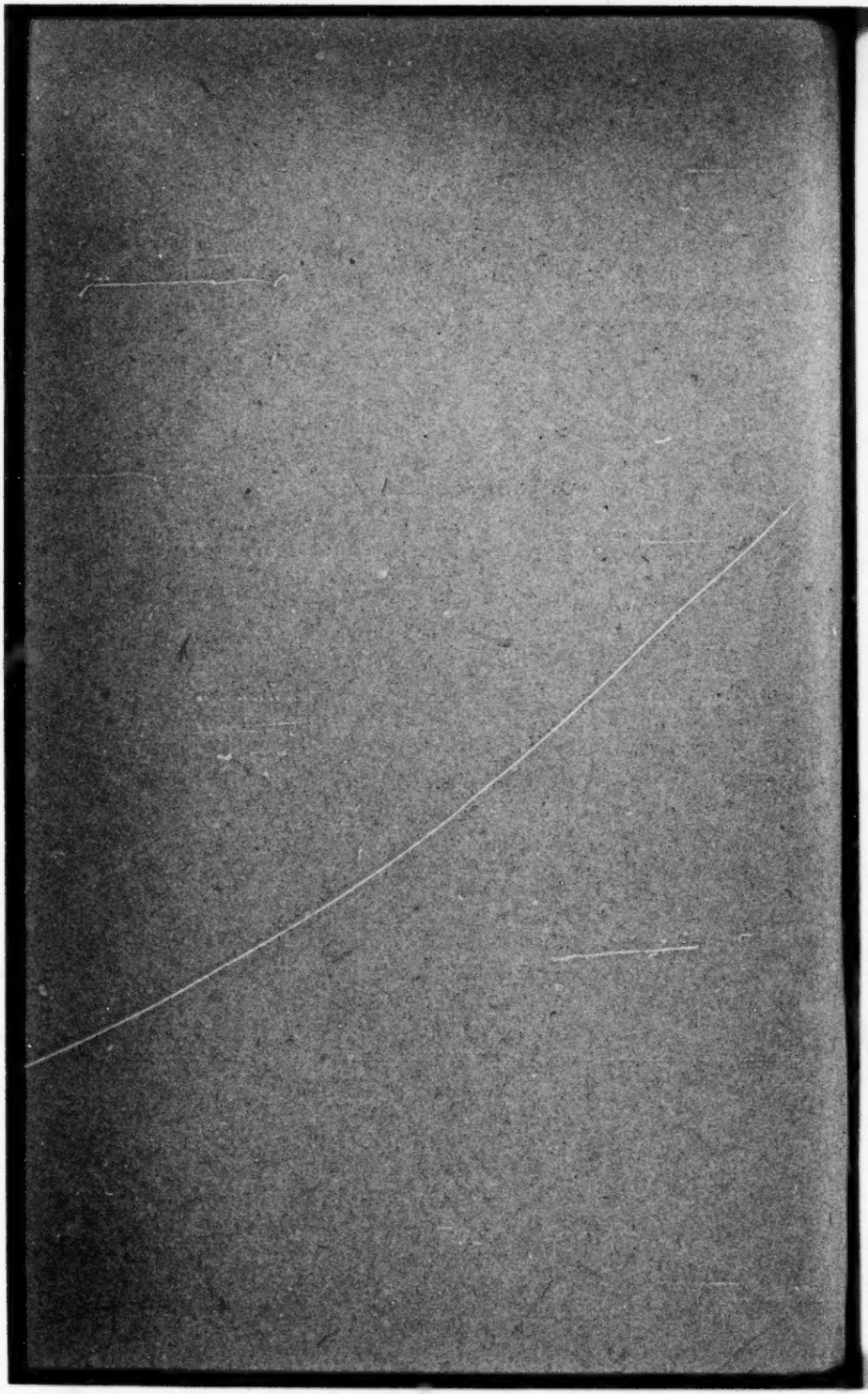
vs.

TIMOTHY O'CONNOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 23, 1909.

(21,907.)



(21,907.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 370.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

TIMOTHY O'CONNOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1910.

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore, and on, to-wit, the eleventh day of February, A. D. 1909, came The Atchison, Topeka and Santa Fe Railway Company by Henry T. Rogers, Esquire and Messrs. Rogers, Ellis and Johnson, its attorneys, and filed in said court its complaint; and sued out of and under the seal of said court a writ of summons against Timothy O'Connor.

And the said complaint is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States, Sitting Within and for the District of Colorado.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

TIMOTHY O'CONNOR, Defendant.

Complaint.

Comes now the plaintiff, The Atchison, Topeka & Santa Fe Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Kansas, and a citizen of
2 said state of Kansas, and complains against the defendant, Timothy O'Connor, a citizen of the state of Colorado and a resident of the district of Colorado, and alleges that the amount in controversy in this action, exclusive of interest and costs, exceeds the sum or value of two thousand dollars ($2000.00).

That the plaintiff is a corporation duly organized and existing under the laws of the state of Kansas as a railway corporation and is empowered by its charter granted by said state of Kansas to own, maintain and operate lines of railway in the state of Kansas, in the state of Colorado, and in other states and territories of the United States, and to own, hold and use property, real or personal, incident to the successful maintenance and operation of said lines of railway and is, and at all times since the month of December, 1899, has been competent and empowered under the laws of the state of Colorado to own, maintain and operate its lines of railway in said state and to own, use and enjoy property, real and personal, incident to the practical and successful maintenance and operation of such lines of railway, and at all times since the month of December, 1899, has owned, maintained, controlled and operated lines of railway in the state of Colorado and has been conducting the business of a

railroad and common carrier of freight and passengers in
3 said state;

That the defendant, at all times from the month of January, 1907, until the month of January, 1909, was the duly elected, qualified and acting Secretary of State of the state of Colorado;

That in the month of December, 1899, in order to become competent under the laws of the state of Colorado to carry on its business in said state, this plaintiff filed its articles of incorporation with the then secretary of state of the state of Colorado and paid all fees required by law and in all respects complied with the statutes of Colorado relating to foreign corporations, and thereupon and thereby became in all respects competent to own and hold real and personal property and to carry on its business as a railroad and common carrier of freight and passengers in said state;

That under the constitution and statutes of the state of Colorado then existing, this plaintiff upon and by reason of the payment of said fees and by reason of the compliance with the statutes of said state as aforesaid, then and thereby entered into a contract with the state of Colorado whereby it obtained the right and privilege to do business as a corporation and to exercise its corporate powers within said state during the period of its authorized corporate
4 existence without the payment of any additional fees or other charges, except such as were then provided by law;

That it was not then provided by law that this plaintiff or any other corporation, foreign or domestic, should pay then or thereafter any annual state license tax, either as provided by the statute of the year 1907, or any other license or tax for the privilege of doing business within said state or of exercising its corporate privileges during the authorized period of its corporate existence, nor was any power reserved in said state of Colorado, either by constitution of said state or by any statutes or laws of said state or by any agreement or contract with this plaintiff, or otherwise, to require this plaintiff or any other corporation, foreign or domestic, to pay an annual state license tax or any sum for the privilege of doing business and exercising its corporate powers in said state during the period of its corporate existence;

That thereafter and in the year 1907 the legislature of the state of Colorado passed a certain act entitled, "An Act in Relation to Public Revenue and Repealing all Previous Acts or parts of Acts in Conflict Herewith," which act provides in section two thereof, as follows:

Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, in addition to the fees and taxes now provided for by law,
5 shall pay, on or before the first day of May, A. D. 1907, and on or before the first day of May of each year thereafter, to the Secretary of State of the state of Colorado, an annual state corporation license tax, as follows: Two cents upon each one thousand dollars of its capital stock.

And further provides that every corporation which shall have failed to pay the said license tax shall be under said act liable by

reason of such failure, to an action of debt, to be brought by the Attorney General in the name of the people of the state of Colorado for the recovery of such ta , and further provides that every corporation which shall fail to pay the tax provided for by said act shall, by reason of such failure, forfeit its right to do business within the limits of said state until such tax is paid, and every such corporation in default for said tax after the first day of May of each year, shall, in addition to said tax, pay a penalty of ten per cent. of said tax for every six months, or fractional part of six months, during which said tax may be delinquent; and further that the Attorney General shall commence an action of quo warranto to suspend the right of any delinquent corporation to carry on business within the limits of said state until such tax shall be paid.

That under the laws of the state of Colorado and under the decisions of the Supreme Court of said state, ministerial offi-
6 cers are not permitted to question the constitutionality of statutes passed by the legislature of said state, but are required to enforce such statutes as written;

That the Secretary of State and the Attorney General of said state, after the passage of said act, threatened that unless this plaintiff should forthwith pay the tax provided for in said act, they would forthwith subject this plaintiff to the penalties in said act provided;

That if this plaintiff should have been subjected to the penalties provided by said act for failure to pay the tax in said act provided, it would have suffered irreparable damage in this: that it would have been prevented from carrying on its business as a common carrier of freight and passengers in this state, and between this state and other states and territories;

That thereafter and on, to-wit, the 2nd day of May, 1907, this plaintiff, solely for the purpose of avoiding the liabilities and penalties imposed by said act, paid to the defendant as Secretary of State, the full amount called for, as a corporation license tax under said act of 1907, to-wit, the full sum of seven thousand six hundred twenty-nine and 72/100 dollars ($7629.72), being two cents upon each one thousand dollars of the plaintiff's capital stock, and ac-
companied said payment with its written protest against the
7 payment of said tax, or any part thereof, on the ground that said act imposing same was unconstitutional and void, and that no warrant of any kind whatsoever existed for the imposing, levying and collecting of such tax, and that it made such payment involuntarily and under protest solely for the purpose of avoiding the liabilities and penalties imposed by said act for failure to pay such tax;

That the defendant received and still retains said seven thousand six hundred twenty-nine and 72/100 dollars ($7629.72) paid as aforesaid to him as Secretary of State of said state of Colorado by this plaintiff involuntarily and under protest as aforesaid, as a corporation license tax provided for by said act of 1907, and although repayment has been frequently demanded of said defendant to repay said sum or any part thereof, said defendant has at all times refused and still refuses, to the damage of this plaintiff in the sum aforesaid.

And this plaintiff alleges that the sum of seven thousand six hundred twenty-nine and 72/100 ($7629.72), dollars was wrongfully and illegally exacted and taken from this plaintiff, and has been at all times and still is wrongfully and illegally retained from this plaintiff in this, that said act of 1907, which provided for the payment of said tax was contrary to the Constitution of the United States and the state of Colorado and was and is inapplicable
8 to this plaintiff:

That said act impaired the obligation entered into between this plaintiff and the state of Colorado at the time this plaintiff filed its articles of incorporation with the Secretary of State of said state, and paid the fees provided by law and in all respects complied with the statutes of Colorado relating to foreign corporations desiring to do business in said state, as hereinbefore stated; wherefore, this plaintiff says that said act was contrary to the Constitution of the United States and particularly to Article One, section ten, clause one thereof.

And plaintiff further alleges that by far the greatest part of the business done by this plaintiff within the state of Colorado since December, 1899, and at all times thereafter, was and has been interstate commerce and the carriage of freight and passengers between said and other states of the United States, and between said state and the territories of the United States, and the carriage of the United States mails and of property belonging to the United States Government, and that but a relatively small part of the business carried on by this plaintiff in the state of Colorado was or has been local or intrastate business not relating to interstate commerce; that but a very small part of the property of this plaintiff is
9 located in the state of Colorado or subject to taxation therein; and that but a very small part of the capital and assets of this plaintiff is used in conducting or carrying on its local or intra-state business,—that is, its business which originates and terminates within the state of Colorado and is not a part of interstate commerce.

That said act of 1907 by its terms imposed a burden upon interstate commerce, and required this plaintiff to pay in addition to all other fees and taxes provided by law, two cents upon each one thousand dollars of its capital stock for the right and privilege of transacting and carrying on, within the limits of the state of Colorado, its business as a common carrier, the greater part of which consisted and has at all times consisted in interstate commerce in the carriage of freight and passengers among the several states and carrying the United States mails and property of the United States Government, and that said act was and is, therefore, contrary to the Constitution of the United States, and particularly to Article One, section eight and clause three thereof.

Plaintiff further says that said act of 1907 is further contrary to the Constitution of the United States, and particularly to Article one, section eight and clause three thereof in this: that by its terms it requires every foreign corporation which has theretofore
10 obtained and which should thereafter obtain the right and privilege of transacting and carrying on its business within the limits of the state of Colorado to pay the fees and tax by said act

provided whether the business carried on by such corporation should consist solely in interstate commerce or of business done for and on behalf of the United States, or otherwise; and further that said act by its terms provided that every corporation which should fail to pay the tax provided for by said act, should by reason of such failure forfeit its right to do business within the limits of said state until such tax should be paid, and thereby by its terms deprived a corporation of its right to carry on the business of interstate commerce or business for and on behalf of the United States Government, until it should pay such tax as provided for by said act.

Wherefore, plaintiff prays judgment against said defendant in the sum of seven thousand six hundred twenty-nine and 72/100 dollars ($7629.72), with interest thereon at the legal rate from the 2nd day of May, 1907, and for its costs in this behalf incurred.

HENRY T. ROGERS,
ROGERS, ELLIS & JOHNSON,
Attorneys for Plaintiff, The Atchison, Topeka & Santa Fe Railway Company.

11 STATE OF COLORADO,
City and County of Denver, ss:

Henry T. Rogers, being first duly sworn on oath, says: That he is the authorized agent & solicitor for Colorado of the plaintiff in the foregoing cause; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

HENRY T. ROGERS.

Subscribed and sworn to before me this eleventh day of February, A. D. 1909.

My commission expires March 5th, 1911.

[NOTARIAL SEAL.] WILLIAM A. REEF,
Notary Public.

(Endorsed:) No. 5287. In the United States Circuit Court within and for the District of Colorado. The Atchison, Topeka & Santa Fe Railway Company, a corporation, plaintiff, vs. Timothy O'Connor, defendant. Complaint. Filed Feb. 11, 1909. Charles W. Bishop, Clerk. Henry T. Rogers, Rogers, Ellis & Johnson, Boston Building, Denver, Colorado, Att'y for Pl'ff. The Atchison, Topeka & Santa Fe Ry. Co.

UNITED STATES OF AMERICA,
District of Colorado, ss:

12 In the Circuit Court of the United States for the District of Colorado.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
versus
TIMOTHY O'CONNOR, Defendant.

Complaint Filed in the Clerk's Office this 11th Day of February, A. D. 1909.

The President of the United States of America to the defendant above named, Greeting:

You are hereby notified that an action has been brought in said court, by the above named plaintiff against you as defendant to recover the sum of seven thousand six hundred twenty-nine and 72/100 dollars ($7,629.72) due to the plaintiff from the defendant by reason of a certain tax on, to-wit, the 2nd day of May, 1907, paid by the plaintiff to the defendant as the then Secretary of State of the State of Colorado, which tax was by the defendant demanded, and by the plaintiff under protest paid, under and by virtue of a certain act passed by the legislature of the state of Colorado, in the year 1907, entitled, "An Act in Relation to Public Revenue and Repealing all Previous Acts or parts of Acts in conflict Herewith;" together with interest thereon at the legal rate from the 2nd day of May, 1907, and for the costs of this action, as more fully set
13 forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within thirty days (exclusive of the day of service) after this summons shall be served on you, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city and county of Denver, in said District, this 11th day of February, A. D. 1909, and of the Independence of the United States the 133rd year.

[Seal U. S. Circuit Court.]

CHARLES W. BISHOP, *Clerk*.
By ALEXANDER C. HITZLER,
Deputy Clerk.

(Endorsed:) No. 5287. United States Circuit Court, for the District of Colorado. The Atchison, Topeka and Santa Fe Railway Company, plaintiff versus Timothy O'Connor, defendant. Sum-

mons. Filed Feb. 13, 1909. Charles W. Bishop, Clerk. Henry T. Rogers and Rogers, Ellis & Johnson, of Denver, Attorneys for plaintiff.

Proof of Service.

UNITED STATES OF AMERICA,
District of Colorado, ss:

14 DENVER, COLORADO, *Feb. 11th*, A. D. 1909.

I hereby certify, that I received the within writ on the 11th day of February, A. D. 190–, and that I have personally served the same upon the said defendant Timothy O'Connor by delivering to Timothy O'Connor personally, a true copy of the within writ, at the time and place as follows: As to —— —— at Denver, county of Denver, on the 11th day of Feb. A. D. 1909.

D. C. BAILEY, *Marshal.*
By E. B. CHADWICK,
Deputy Marshal.

Eighty-Sixth Day, November Term, Monday, March 22nd, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
vs.
TIMOTHY O'CONNOR.

Money Demand.

At this day comes the plaintiff by Daniel B. Ellis, Esquire, its attorney, no one appearing for or on behalf of the defendant. And the motion of the defendant to strike out certain portions of the complaint herein coming on now to be heard, is submitted to the court. And the court having considered the same and being now fully advised in the premises;

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be, and the same is hereby, denied.

15 Ninety-Fifth Day, November Term, Thursday, April 15th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third of November, A. D. 1908.

5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
vs.
TIMOTHY O'CONNOR.

Money Demand.

At this day comes the plaintiff by George A. H. Fraser, Esquire, its attorney, and the defendant by James H. Teller, Esquire, his attorney, also comes.

And thereupon, on motion of the defendant, it is ordered by the court that he have leave to file herein a demurrer to the complaint within three (3) days from this day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States, Sitting Within and for the District of Colorado.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
TIMOTHY O'CONNOR, Defendant.

Demurrer.

Comes now the above named defendant, Timothy O'Connor, and demurs to the complaint filed herein, and for ground of de-
16 murrer alleges:

That the said complaint does not state facts sufficient to constitute a cause of action.

JOHN T. BARNETT,
JAMES H. TELLER,
Attorneys for Defendant.

(Endorsed:) No. 5287. In the U. S. Circuit Court. The A., T. & S. F. Ry. Co., plaintiff vs. Timothy O'Connor, defendant. Demurrer to complaint. Filed Apr. 17, 1909. Charles W. Bishop, Clerk.

Forty-Seventh Day, May Term, Monday, August 30th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
vs.
TIMOTHY O'CONNOR.

Money Demand.

The demurrer to the complaint herein having heretofore come on to be heard, and having been argued by George A. H. Fraser, Esquire, attorney for the plaintiff, and by James J. Teller, Esquire, attorney for the defendant, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises;

It seemeth to the court now here that the complaint herein is not sufficient in law to be answered unto and so the said de-
17 murrer is hereby sustained.

Forty-Eighth Day, May Term, Tuesday, August 31st, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
vs.
TIMOTHY O'CONNOR.

Money Demand.

At this day comes the plaintiff by George A. H. Fraser, Esquire, its attorney, and saith it will and doth hereby elect to stand by its complaint herein and declines to plead further.

Wherefore, it is considered by the court that the defendant go hence hereof without day and have and recover of and from the plaintiff his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor. And bond on writ of error shall be in the sum of five hundred dollars ($500).

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

No. 5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
TIMOTHY O'CONNOR, Defendant.

Assignment of Errors.

18 Comes now the plaintiff above named by Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller and George A. H. Fraser, its attorneys, and files the following assignment of errors upon which it will rely in the prosecution of a writ of error to the supreme court of the United States in the above entitled cause, to-wit:

1. That the circuit court the United States for the district of Colorado erred in sustaining defendant's demurrer to the complaint in said cause, to which said order sustaining said demurrer plaintiff, by its counsel, then and there duly excepted.

2. That said circuit court for the district of Colorado erred in entering judgment in said cause in favor of defendant therein, to which said judgment and the entry thereof, plaintiff, by its counsel, then and there duly excepted.

3. That said circuit court for the district of Colorado erred in entering judgment dismissing said cause at plaintiff's costs, to which said judgment and the entry thereof, plaintiff, by its counsel, then and there duly excepted.

4. That in and by the aforesaid order or ruling, sustaining said demurrer to the complaint, and in and by said judgment dismissing said cause, and the entry thereof, said circuit court for the district of Colorado erroneously construed and applied the Constitution of the United States, and especially Article one, section ten thereof,

19 providing in part that "No State shall * * * pass any * * * Law impairing the obligation of contracts."

5. That in and by the aforesaid order or ruling sustaining said demurrer to the complaint, and in and by said judgment dismissing said cause and the entry thereof, said circuit court of the district of Colorado erroneously construed and applied the Constitution of the United States and especially the 14th Amendment thereto, providing, in part that no state shall deprive any person of property without due process of law, nor deny to any person the equal protection of the law."

6. That in and by the aforesaid order or ruling sustaining said demurrer to the complaint, and in and by said judgment of dismissal and the entry thereof, said circuit court for the district of Colorado erroneously held that a certain law of the state of Colorado, to-

wit, an act of the Legislature of the state of Colorado, approved April 1st, 1907, and found in the session laws of Colorado, for 1907, chapter 211 pp. 548 to 551, inclusive, being an act entitled "An Act in Relation to Public Revenue and Repealing all previous Acts or parts of Acts in conflict therewith." was not in contravention of the Constitution of the United States and especially Article One, section Eight, paragraph Three thereof, providing that "The Congress shall have power * * * (3) to regulate commerce with foreign nations, among the several states and with the Indian tribes."

20 7. That in and by the aforesaid order or ruling sustaining said demurrer, and in and by said judgment of dismissal, and the entry thereof, said circuit court for the district of Colorado erred in that it held that the facts pleaded in the complaint herein are not sufficient to show duress and an involuntary payment of the tax described in said complaint, and in that it held that said tax was paid voluntarily by plaintiff and not under duress.

8. That the judgment in said cause is contrary to law.

Wherefore, said plaintiff, and plaintiff in error, prays that the judgment of the circuit court of the United States for the district of Colorado, in the above entitled cause, be reversed and that said cause be remanded to said circuit court for further proceedings therein.

HENRY T. ROGERS.
DANIEL B. ELLIS.
LEWIS B. JOHNSON.
PIERPONT FULLER.
GEORGE A. H. FRASER.

(Endorsed:) No. 5287. In the United States Circuit Court within and for the district of Colorado. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, vs. Timothy O'Connor, Defendant. Assignment of errors on writ of error to Supreme Court of the United States. Filed Nov. 3, 1909. Charles W. Bishop, Clerk. Rogers, Cuthbert & Ellis, Boston Building, Denver, Colorado.

21 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

No. 5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
TIMOTHY O'CONNOR, Defendant.

Petition for Writ of Error.

To the Honorable the Circuit Court of the United States sitting within and for the district of Colorado:

Now comes The Atchison, Topeka and Santa Fe Railway Company, the plaintiff above named, by Henry T. Rogers, Daniel B.

Ellis, Lewis B. Johnson, Pierpont Fuller and George A. H. Fraser, its attorneys, and says: That on, to-wit, the 31st day of August, 1909, the said circuit court entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more fully and in detail appear from the assignment of errors filed with this petition.

Wherefore, plaintiff says that a writ of error may issue in
22 this behalf out of the supreme court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated may be sent to said supreme court.

HENRY T. ROGERS.
DANIEL B. ELLIS.
LEWIS B. JOHNSON.
PIERPONT FULLER.
GEORGE A. H. FRASER.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

No. 5287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
TIMOTHY O'CONNOR, Defendant.

Order Allowing Writ of Error.

Upon motion of plaintiff in the above entitled cause for leave to prosecute a writ of error from the judgment of the court herein to the supreme court of the United States, and upon the filing of a petition for such writ of error and upon filing an assignment of the errors relied upon;

It is hereby ordered that a writ of error be, and it is hereby, allowed for the purpose of reviewing in the supreme court
23 of the United States the judgment heretofore entered herein, and that the amount of the bond upon said writ of error be, and it hereby is, fixed in the sum of five hundred ($500) dollars, the same to act as a bond for costs and damages on appeal.

Dated, November 3rd, 1909.

ROB'T E. LEWIS, *Judge*.

(Endorsed:) No. 5287. In the United States Circuit Court within and for the district of Colorado. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, vs. Timothy O'Connor, Defendant. Petition for writ of error. Order allowing writ of error. Filed Nov. 3, 1909. Charles W. Bishop, Clerk. Rogers, Cuthbert & Ellis, Boston Building, Denver, Colorado.

Know all men by these presents, That we, The Atchison, Topeka, and Santa Fe Railway Company, as principal, and Gordon Jones and A. C. Foster, as sureties, are held and firmly bound unto Timothy O'Connor, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Timothy O'Connor, his certain attorney; executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this second day of November, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a regular term of the circuit court of the
24 United States sitting within and for the district of Colorado in a suit depending in said court, between said, The Atchison, Topeka and Santa Fe Railway Company as plaintiff and said Timothy O'Connor, as defendant, being No. 5287, on the docket of said court, a judgment was rendered against the said The Atchison, Topeka and Santa Fe Railway Company and the said The Atchison, Topeka and Santa Fe Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Timothy O'Connor citing and admonishing him to be and appear at a supreme court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, that if the said Atchison, Topeka and Santa Fe Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
By HENRY T. ROGERS, [SEAL.]
Its Attorney & Agent.
GORDON JONES. [SEAL.]
A. C. FOSTER. [SEAL.]

Approved by
ROB'T E. LEWIS,
District Judge.

25 (Endorsed:) No. 5287. In the United States Circuit Court, within and for the district of Colorado. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, vs. Timothy O'Connor, Defendant. Bond on writ of error to Supreme Court of United States. Filed Nov. 3, 1909. Charles W. Bishop, Clerk. Rogers, Cuthbert & Ellis, Boston Building, Denver, Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

No. 5287.

THE ATCHISON, TOPEKA & SANTA FE RY. CO.
versus
TIMOTHY O'CONNOR.

The clerk will prepare in the above entitled cause, a copy of entire record including all pleadings, orders and exceptions in connection with writ of error to supreme court of United States.

GARDINER LATHROP,
ROBERT DUNLAP,
HENRY T. ROGERS,
Attorneys for Pl'ffs.

To Charles W. Bishop, Clerk, Denver, Colorado, Sept. 20, 1909.

(Endorsed:) No. 5287. United States Circuit Court, for the district of Colorado. The Atchison, Topeka and Santa Fe Railway Co. versus Timothy O'Connor. Præcipe for record on writ of error to Supreme Court of U. S. Filed Sep. 20, 1909. Charles W. Bishop, Clerk. Gardiner Lathrop, Robert Dunlap, Henry T. Rogers, Attorneys for Pl'ff & Pl'ff in error.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States, for the District of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Atchison, Topeka and Santa Fe Railway Company and Timothy O'Connor, a manifest error hath happened, to the great damage of the said The Atchison, Topeka and Santa Fe Railway Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of November, in the year of our Lord one thousand nine hundred and nine.

[Seal of the United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk U. S. Circuit Court, District of Colorado.

Allowed November 3d, 1909.

ROBT. E. LEWIS, *Judge.*

27 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the Honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness, my hand and the seal of said Circuit Court, at Denver, in said district, this fifteenth day of November, A. D. 1909.

CHARLES W. BISHOP, *Clerk.*

28 [Endorsed:] No. 5287. Supreme Court of the United States. The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, vs. Timothy O'Connor, defendant in error. Writ of error to Circuit Court, U. S. District of Colorado. Filed Nov. 3, 1909. Charles W. Bishop, clerk. Henry T. Rogers, attorney for plaintiff in error.

29 UNITED STATES OF AMERICA, *ss:*

To Timothy O'Connor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States for the district of Colorado, wherein The Atchison, Topeka, and Santa Fe Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado and ex-officio Judge of the Circuit Court of the United States for the district of Colorado, at Denver, in said district, this third day of November, A. D. 1909.

ROBT. E. LEWIS, *Judge.*

30 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of Colo., ss:

I hereby certify and return that I served the annexed Citation on the therein-named Timothy O'Connor by handing to and leaving a true and correct copy thereof with Timothy O'Connor, personally at Boulder, in said District, on the 6 day of November, A. D. 1909.

D. C. BAILEY, *U. S. Marshal.*
By THOMAS CLARK, *Deputy.*

Fees & Exp. $3.80.

31 *Proof of Service.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this — day of November, A. D. 1909, personally appeared —— ——, before me, the subscriber, clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and Subscribed the — day of November, A. D. 1909.

— ——.

32 [Endorsed:] No. 5287, 3128. Supreme Court of the United States. The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, vs. Timothy O'Connor, defendant in error. Citation. Filed Nov. 15, 1909. Charles W. Bishop, clerk.

33 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to twenty-five (25) both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, assignments of error, petition for writ of error, bond on writ of error, and all proceedings in the case, as directed in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed and entered of record in said court, and in a certain case lately in said court pending, wherein The Atchison, Topeka and Santa Fe Railway Company was plaintiff and Timothy O'Connor was defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit here-

with a copy of all opinions heretofore handed down and filed in said case.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, this fifteenth day of November, A. D. 1909.

[Seal of the United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk*.

34 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

No. 5287.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
TIMOTHY O'CONNOR, Defendant.

The complaint charges that the plaintiff, on May second, 1907, paid to the defendant, as secretary of state, the sum of seven thousand, six hundred and twenty-nine dollars and seventy-two cents ($7629.72) as a tax required from it by an act of the Legislature found in session laws of Colorado, 1907, at page 548 et seq. This act denominates the tax as the "annual state corporation license tax," and the amount thereof is based on the capital stock. It is exacted, by the terms of the statute, "for the right and privilege to transact and carry on business within the limits of the state of Colorado." This suit is brought to recover back the amount of that payment, and the chief contention in argument on demurrer to the complaint is that the state statute is void because it is, in effect, a burden upon and an interference with interstate commerce. The state statute has not been construed by the supreme court of
35 Colorado in its particular aspect now under consideration.

It is charged in the complaint that a very small part of the business of the plaintiff transacted in Colorado is intrastate business, and that a very small part of the property of the plaintiff is located in the state of Colorado. These allegations of fact may be accepted as true and as lying within common knowledge. The defendant's railway traverses many states. In mileage it is one of the most extensive systems on the continent. But we also take judicial knowledge of the fact that it operates more than three hundred (300) miles of railway in the state of Colorado; it touches and constantly serves the three largest cities in the state and many towns of commercial importance. It is impossible to ignore the patent fact that the plaintiff's business, both in freight and passenger service, purely local and intrastate, is of great volume.

Can the statute be construed as applicable to intrastate business only? If so, this view would save the statute and is to be preferred, rather than one that would lead to its destruction.

Nicol vs. Ames, 173 U. S., 509.

In Osborne vs. State of Florida, 33 Fla., 162, a similar statute was under consideration, and its literal terms gave it such breadth that it included both interstate and local commerce. It was construed by the court as applicable to intrastate commerce only. The same construction was given a state statute of like terms by
36 the supreme court of Montana in State vs. Rocky Mountain Bell Telephone Co., 71 Pac., and by the Texas Court of Civil Appeals in the Standard Oil case, Advanced Sheet Opinions of the U. S. Supreme Court.

These authorities are ample to justify the belief that the Supreme Court of Colorado would construe the statute under consideration as applicable alone to intrastate commerce, and are also sufficient to lead to such a construction by this court in the absence of a determination of the question by the highest court in this state.

It is further believed that the payment of the tax by the plaintiff was made voluntarily and not under duress. The facts pleaded are not sufficient to show duress and an involuntary payment of the tax, and for that reason also the complaint is bad.

Radich vs. Hutchins, 95 U. S., 210;
Railroad Co. vs. Commissioners, 98 U. S., 541;
The Sanoma County Tax Case, 13 Fed., 789,

and many cases cited in defendant's brief.

The defendant's demurrer to the complaint is sustained.

ROBT. E. LEWIS,
August 30th, 1909. *District Judge.*

(Endorsed:) 5287. U. S. Circuit Court, district of Colorado. Atchison, Topeka and Santa Fe Railway Company vs. Timothy O'Connor. Opinion of Lewis, J. Filed Aug. 30, 1909.
37 Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from twenty-six (26) to twenty-eight (28), to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in a certain case lately in said court pending, wherein The Atchison, Topeka and Santa Fe Railway Company was plaintiff and Timothy O'Connor was defendant, as fully and completely as the same still remains on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the City and County of Denver, in said district, this fifteenth day of November, A. D. 1909.

[Seal of the United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Endorsed on cover: File No. 21,907. Colorado, C. C. U. S. Term No. 370. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, vs. Timothy O'Connor. Filed November 23d, 1909. File No. 21,907.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 162

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Plaintiff in Error,

vs.

TIMOTHY O'CONNOR,

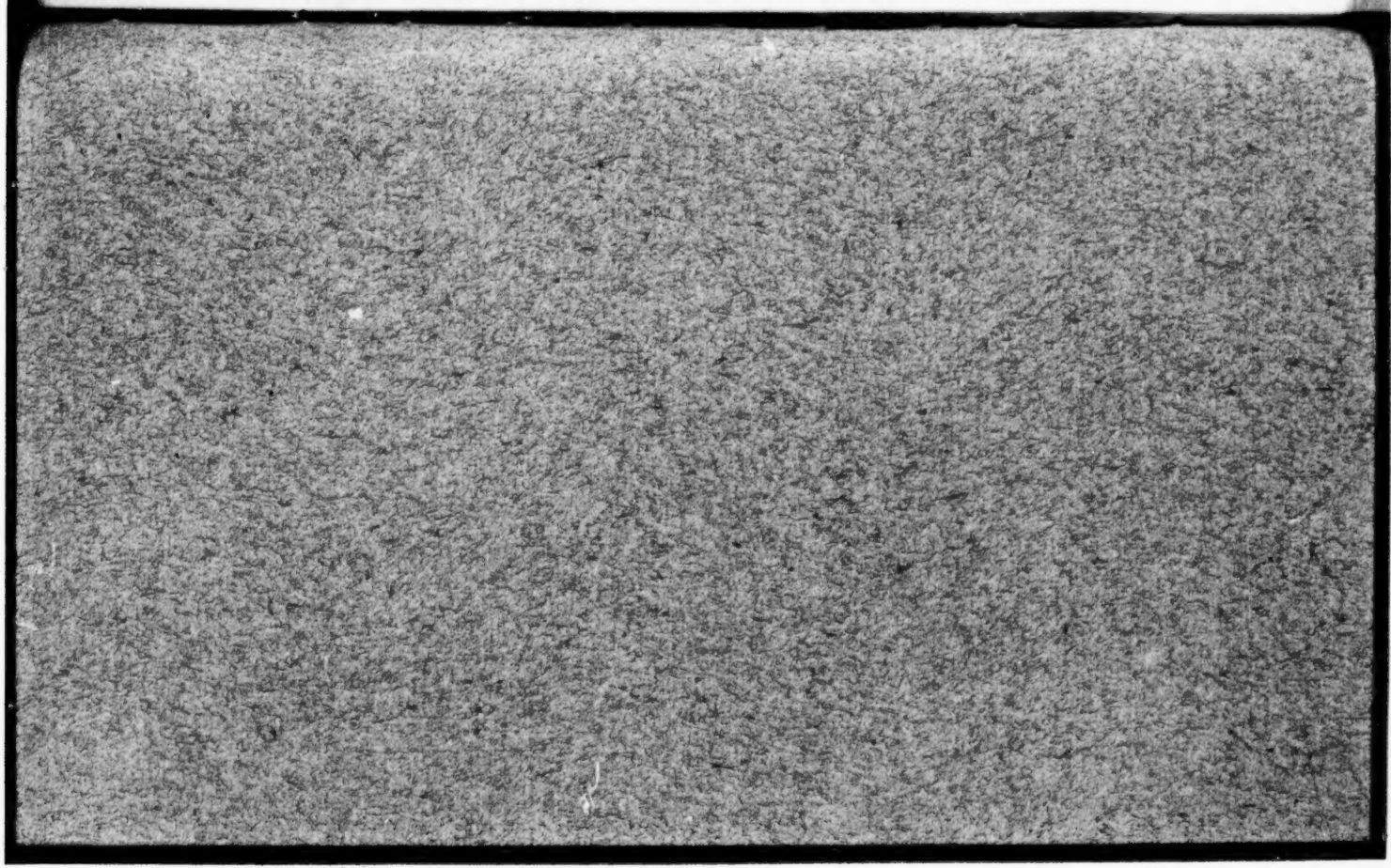
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

ROBERT DUNLAP,
H. T. ROSSON,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Counsel.

[illegible]



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 162

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

TIMOTHY O'CONNOR,
Defendant in Error.

STATEMENT.

Plaintiff in error brought suit against defendant in error in the United States Circuit Court for the District of Colorado to recover on account of an illegal license fee exacted by the defendant as State Treasurer under an unconstitutional law and paid by plaintiff under protest.

The complaint filed in the case alleged that plaintiff was a corporation organized under the laws of Kansas empowered to own, maintain, and operate lines of railway in the State of Kansas, in the State

of Colorado, and in other States and Territories of the United States, and to own, hold and use property; real and personal, incident to the successful maintenance and operation of said lines of railway, and at all times since December, 1899, was empowered under the laws of Colorado to own, maintain and operate its lines of railway in said state, and to own, use and enjoy property, real and personal, incident to the practical and successful maintenance and operation of such lines of railway, "and at all times since the month of December, 1899, has owned, maintained, controlled and operated lines of railway in the State of Colorado and has been conducting the business of a railroad and common carrier of freight and passengers in said state"; that the defendant from January, 1907, until January, 1909, was the Secretary of State of the State of Colorado;

> "That in the month of December, 1899, in order to become competent under the laws of the State of Colorado to carry on its business in said state, this plaintiff filed its articles of incorporation with the then secretary of state of the State of Colorado and paid all fees required by law and in all respects complied with the statutes of Colorado relating to foreign corporations, and thereupon and thereby became in all respects competent to own and hold real and personal property and to carry on its business as a railroad and common carrier of freight and passengers in said state;
>
> That under the constitution and statutes of the State of Colorado then existing, this plaintiff upon and by reason of the payment of said fees and by reason of the compliance with the statutes of said state as aforesaid, then and thereby entered into a contract with the State of Colorado whereby it obtained the right and privi-

lege to do business as a corporation and to exercise its corporate powers within said state during the period of its authorized corporate existence without the payment of any additional fees or other charges, except such as were then provided by law;

That it was not then provided by law that this plaintiff or any other corporation, foreign or domestic, should pay then or thereafter any annual state license tax, either as provided by the statute of the year 1907, or any other license or tax for the privilege of doing business within said state or of exercising its corporate privileges during the authorized period of its corporate existence, nor was any power reserved in said State of Colorado, either by constitution of said state or by any statutes or laws of said state or by any agreement or contract with this plaintiff, or otherwise, to require this plaintiff or any other corporation, foreign or domestic, to pay an annual state license tax or any sum for the privilege of doing business and exercising its corporate powers in said state during the period of its corporate existence;

That thereafter and in the year 1907 the legislature of the State of Colorado passed a certain act entitled, 'An Act in Relation to Public Revenue and Repealing all Previous Acts or parts of Acts in Conflict Herewith,' which act provides in section two thereof, as follows:

'Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, in addition to the fees and taxes now provided for by law, shall pay, on or before the first day of May, A. D. 1907, and on or before the first day of May of each year thereafter, to the Secretary of State of the State of Colorado, an annual state corporation license tax, as follows: Two cents upon each one thousand dollars of its capital stock.'

And further provides that every corporation which shall have failed to pay the said license tax shall be under said act liable by reason of such failure, to an action of debt, to be brought by the Attorney General in the name of the people of the State of Colorado for the recovery of such tax; and further provides that every corporation which shall fail to pay the tax provided for by said act shall, by reason of such failure, forfeit its right to do business within the limits of said state until such tax is paid, and every such corporation in default for said tax after the first day of May of each year, shall, in addition to said tax, pay a penalty of ten per cent. of said tax for every six months, or fractional part of six months, during which said tax may be delinquent; and further that the Attorney General shall commence an action of quo warranto to suspend the right of any delinquent corporation to carry on business within the limits of said state until such tax shall be paid.

That under the laws of the State of Colorado and under the decisions of the Supreme Court of said state, ministerial officers are not permitted to question the constitutionality of statutes passed by the legislature of said state, but are required to enforce such statutes as written;

That the Secretary of State and the Attorney General of said state, after the passage of said act, threatened that unless this plaintiff should forthwith pay the tax provided for in said act, they would forthwith subject this plaintiff to the penalties in said act provided;

That if this plaintiff should have been subjected to the penalties provided by said act for failure to pay the tax in said act provided, it would have suffered irreparable damage in this: that it would have been prevented from carrying on its business as a common carrier of freight and passengers in this state, and between this state and other states and territories;

That thereafter and on, to wit, the 2nd day of May, 1907, this plaintiff, solely for the purpose of avoiding the liabilities and penalties imposed by said act, paid to the defendant as Secretary of State, the full amount called for, as a corporation license tax under said act of 1907, to wit, the full sum of seven thousand six hundred twenty-nine and 72/100 dollars ($7,629.72), being two cents upon each one thousand dollars of the plaintiff's capital stock, and accompanied said payment with its written protest against the payment of said tax, or any part thereof, on the ground that said act imposing same was unconstitutional and void, and that no warrant of any kind whatsoever existed for the imposing, levying and collecting of such tax, and that it made such payment involuntarily and under protest solely for the purpose of avoiding the liabilities and penalties imposed by said act for failure to pay such tax;

That the defendant received and still retains said seven thousand six hundred twenty-nine and 72/100 dollars ($7,629.72) paid as aforesaid to him as Secretary of State of said State of Colorado by this plaintiff involuntarily and under protest as aforesaid, as a corporation license tax provided for by said act of 1907, and although repayment has been frequently demanded of said defendant to repay said sum or any part thereof, said defendant has at all times refused and still refuses, to the damage of this plaintiff in the sum aforesaid.

And this plaintiff alleges that the sum of seven thousand six hundred twenty-nine and 72/100 ($7,629.72), dollars was wrongfully and illegally exacted and taken from this plaintiff, and has been at all times and still is wrongfully and illegally retained from this plaintiff in this, that said act of 1907, which provided for the payment of said tax was contrary to the Constitution of the United States and the State of

Colorado and was and is inapplicable to this plaintiff:

That said act impaired the obligation entered into between this plaintiff and the State of Colorado at the time this plaintiff filed its articles of incorporation with the Secretary of State of said state, and paid the fees provided by law and in all respects complied with the statutes of Colorado relating to foreign corporations desiring to do business in said state, as hereinbefore stated; wherefore, this plaintiff says that said act was contrary to the Constitution of the United States and particularly to Article One, section ten, clause one thereof.

And plaintiff further alleges that by far the greatest part of the business done by this plaintiff within the State of Colorado since December, 1899, and at all times thereafter, was and has been interstate commerce and the carriage of freight and passengers between said state and other states of the United States, and between said state and the territories of the United States, and the carriage of the United States mails and of property belonging to the United States Government, and that but a relatively small part of the business carried on by this plaintiff in the State of Colorado was or has been local or intrastate business not relating to interstate commerce; that but a very small part of the property of this plaintiff is located in the State of Colorado or subject to taxation therein; and that but a very small part of the capital and assets of this plaintiff is used in conducting or carrying on its local or intrastate business,—that is, its business which originates and terminates within the State of Colorado and is not a part of interstate commerce.

That said act of 1907 by its terms imposed a burden upon interstate commerce, and required this plaintiff to pay in addition to all other fees

and taxes provided by law, two cents upon each one thousand dollars of its captial stock for the right and privilege of transacting and carrying on, within the limits of the State of Colorado, its business as a common carrier, the greater part of which consisted and has at all times consisted in interstate commerce in the carriage of freight and passengers among the several states and carrying the United States mails and property of the United States Government, and that said act was and is, therefore, contrary to the Constitution of the United States, and particularly to Article One, section eight and clause three thereof.

Plaintiff further says that said act of 1907 is further contrary to the Constitution of the United States, and particularly to Article one, section eight and clause three thereof in this: that by its terms it requires every foreign corporation which has theretofore obtained and which should thereafter obtain the right and privilege of transacting and carrying on its business within the limits of the State of Colorado to pay the fees and tax by said act provided whether the business carried on by such corporation should consist solely in interstate commerce or of business done for and on behalf of the United States, or otherwise; and further that said act by its terms provided that every corporation which should fail to pay the tax provided for by said act, should by reason of such failure forfeit its right to do business within the limits of said state until such tax should be paid, and thereby by its terms deprived a corporation of its right to carry on the business of interstate commerce or business for and on behalf of the United States Government, until it should pay such tax as provided for by said act.

Wherefore, plaintiff prays judgment against said defendant in the sum of seven thousand six hundred twenty-nine and 72/100 dollars

($7,629.72), with interest thereon at the legal rate from the 2nd day of May, 1907, and for its costs in this behalf incurred." (Record, pages 1 to 5, inclusive.)

Defendant filed a general demurrer to this complaint. (Rec., 8.)

This demurrer was sustained, defendant dismissed without day and judgment rendered in his favor for costs. (Rec., 9.)

The ruling of the court on the demurrer is found on pages 17 and 18 of record.

Specifications of Error.

1. The Circuit Court erred in sustaining defendant's demurrer and rendering judgment in defendant's favor.

2. In its ruling sustaining said demurrer said Circuit Court erroneously construed and applied the Constitution of the United States, especially Article I, Section 10 thereof, providing, in part, that "no State * * * shall pass any * * * law impairing the obligation of contracts."

3. In sustaining said demurrer said Circuit Court erroneously construed and applied the Constitution of the United States and especially the 14th Amendment thereto, providing, in part that no state shall deprive any person of property without due process of law, nor deny to any person the equal protection of the law.

4. In sustaining said demurrer said Circuit Court erroneously held that a certain law of the State of

Colorado, to wit, an act of the Legislature of the State of Colorado, approved April 1, 1907 (Chapter 211, pp. 548 to 551, Session Laws of Colorado, 1907), being an act entitled "An Act in Relation to Public Revenue and Repealing all previous Acts or parts of Acts in conflict therewith," was not in contravention of the Constitution of the United States and especially Article one, Section Eight, paragraph three thereof, providing that "The Congress shall have power * * * to regulate commerce with foreign nations, among the several states and with the Indian tribes."

5. That in sustaining said demurrer said Circuit Court erroneously held that the facts pleaded in the complaint were not sufficient to show duress and involuntary payment of the tax described in said complaint, and erred in holding that said tax was paid voluntarily by plaintiff and not under duress.

ARGUMENT.

I.

WHEN THE RAILWAY COMPANY IN 1899 PAID TO THE STATE OF COLORADO THE FEES REQUIRED OF FOREIGN CORPORATIONS BY THE LAW OF 1897, AND OTHERWISE COMPLIED WITH THE LAWS THEN IN FORCE, IT OBTAINED A VESTED OR CONTRACT RIGHT TO TRANSACT ITS BUSINESS AS A FOREIGN CORPORATION WITHIN THAT STATE AND THE SUBSEQUENT LAW OF 1907, WHICH ATTEMPTED TO IMPOSE AN ADDITIONAL ANNUAL LICENSE TAX FOR THE SAME PRIVILEGES, IMPAIRED THE OBLIGATION OF THE CONTRACT BETWEEN THE RAILWAY COMPANY AND THE STATE CREATED BY VIRTUE OF A COMPLIANCE WITH THE LAW OF 1897.

The complaint alleged that in December, 1899, the plaintiff filed its Articles of Incorporation with the then Secretary of State and paid all fees required by law and in all respects complied with the statutes of Colorado relating to foreign corporations and thereupon became competent to carry on its business as a railroad company and common carrier of freight and passengers in said state.

Chapter 48, Session Laws of Colorado, 1893, pages 88, 89 and 90, required foreign corporations, before being authorized or permitted to do any business in the state, to make and file a certificate with the Secretary of State designating the principal place where the business of such corporation should be carried on in the State, and an authorized agent therein

residing upon whom process might be served, etc. A copy of this act will be found in the Appendix hereto.

In 1897 another law was passed (Chapter 51, Session Laws of Colorado, 1897, page 157, set forth in full in Appendix hereto) requiring every corporation, foreign and domestic, having capital stock divided into shares to pay to the Secretary of State a fee of ten dollars where the capital stock did not exceed fifty thousand dollars, and where it did, the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. This fee was payable on the filing of the certificate of incorporation in the office of the Secretary of State, and it was provided that no such corporation should have or exercise any corporate powers or be permitted to do any business in the state until said fee should have been paid. The Secretary of State was forbidden to file any certificate of incorporation or give any certificate to such corporation until said fee should be paid. Any foreign corporation doing business in the state that had since the filing of its certificate in the state increased its capital stock without paying the fees prescribed at the time of such increase, or that should thereafter increase its capital stock, should be liable to pay the fees prescribed by this act, and it was made the duty of the secretary to at once cause action to be brought for the recovery of such fees, and an action in the nature of *quo warranto* would lie against any foreign corporation to test its right

to exercise corporate franchises in the state. The secretary was forbidden to file or record any certificate of paid up stock or other paper of any character, or to issue any certificate to any corporation unless the Articles of Incorporation were already on file in his office, nor unless all fees prescribed by this act should have been paid.

From the provisions of this law it will be seen that domestic corporations upon incorporating thereafter, and foreign corporations before being permitted to do business as such within the state, were required to pay a lump sum of money based upon entire capitalization, and upon any subsequent increases of capitalization the same per cent. upon the increase. The sum exacted from each such corporation was for the privilege of transacting its business in a corporate capacity within the state. In the case of domestic corporations it was necessarily exacted for the period of the corporate life of such corporation as authorized by the laws of the state. In the case of foreign corporations it was either during the charter existence of such corporation or at least during the same period that domestic corporations were authorized to exist. It is not important in this case to determine which.

On the payment and acceptance of the fees required by the law of 1897 a contract executed on the part of the Railway Company arose between it and the state under which the Railway Company obtained a vested right to transact in its corporate capacity the business authorized by its charter,—that of owning, using, and operating a railroad within the state.

After the state, however, had received all that it had bargained for in the law of 1897 from both foreign and domestic corporations for the privilege or permission to carry on their business within the state and had received considerable revenue therefrom it conceived a scheme of raising additional annual revenue from such corporations by imposing an annual license tax on such corporations. In Chapter 211, Sessions Laws of Colorado, 1907, pages 548, *et seq.*, (a copy of which is set out in full in the Appendix hereto), every foreign corporation which had theretofore obtained or which should thereafter obtain the right and privilege to transact and carry on business within the limits of the state in addition to the fees and taxes then provided for by law was required to pay on or before the first day of May, 1907, and on or before the first day of May of each year thereafter to the Secretary of State, an "annual state corporation license tax as follows: Two cents upon each one thousand dollars of its capital stock." In Section 7 it was provided that every corporation which failed to pay the tax as provided should "by reason of such failure forfeit its right to do business within the limits of this state until such tax is paid."

Thus a foreign corporation which had paid a bonus for the privilege of carrying on its business within the state in its corporate capacity was by this subsequent law required to pay something additional for the very same privilege or permission.

This subsequent law undoubtedly impaired the right which had vested in the Railway Company

upon its compliance with the law of 1897, and impaired the obligation of the contract between it and the state created by reason of such compliance.

American Smelting & Refining Co. v. *Colorado*, 204 U. S., 107.

Commonwealth v. *Proprietors of New Bedford Bridge*, 2 Gray, 339.

It is true the *American Smelting & Refining Company case* arose under the law of 1902 which imposed upon a foreign corporation, which, in that case, had paid the bonus required by the law of 1897, a greater annual license tax than was by such law imposed upon domestic corporations, and which was ostensibly amended by the Statute of 1907 to obviate the objection based on discrimination. It was admitted, for the purposes of argument in that case, that the foreign corporation was not entitled to any exemption from taxes which the state might properly impose upon persons or corporations within her borders. The concession in the argument was readily made to obviate a discussion of the effect of a provision in Chapter 48, Session Laws of 1893, relating to foreign corporations, as follows:

> "And such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the laws of this state and shall have no other or greater powers."

The provision is not unusual. It was simply intended to impose upon the foreign corporation the same liabilities in favor of those dealing with it as was imposed upon domestic corporations. The re-

strictions refer to the limitation of its powers, and the duties would be those which would be owing by such corporations as such to the public. Such provision could hardly be read as materially qualifying rights obtained by a foreign corporation by a compliance with the subsequent law of 1897 except in the above respects. It could hardly be held as justifying a construction of the law of 1897 which would authorize the state after exacting a bonus from a foreign corporation for the privilege of carrying on its business within the state to afterwards impose an additional charge for the same privilege. That would not have been fairly contemplated by the parties at the time.

But however that may be even a domestic corporation which upon its incorporation had paid the bonus required by the law of 1897 would no doubt have obtained a vested right or privilege of carrying on its business as a corporation under the laws of the state without having imposed upon it a subsequent additional exaction for the right or privilege which it had bought. The domestic corporation as well as the foreign corporation on paying such bonus would have acquired a contract or vested right to carry on its business and exercise its privileges in a corporate capacity during the period of its existence. Therefore, a foreign corporation on complying with the law of 1897 would at least be put upon a parity with a domestic corporation which had complied with the same law.

In the early case of *Attorney General* v. *Bank*, 4 Jones Equity (N. C.), 287, it was held that a corporation paying a bonus on obtaining its charter be-

came vested, under the contract which thus arose with the state, with the right to carry on its business in its corporate capacity and a subsequent statute attempting to impose an additional charge was held to impair the obligations of such contract.

To the same effect see:

Gordon v. *Appeal Tax Court,* 3 Howard, 133.

New York, etc., Rld. Co. v. *Pennsylvania,* 153 U. S., 628.

Wendover v. *City,* 15 B. Monroe (Ky.), 258.

Bank v. *Knoop,* 16 Howard, 369.

In *Commonwealth* v. *Mobile & Ohio Rld. Co.,* 23 Ky. L. R., 784, 64 S. W., 451, the State of Kentucky authorized a foreign corporation to construct and acquire a line of railroad within the state. Some years after such construction and acquisition the state attempted to require the foreign corporation to incorporate under its laws. This was held to be an impairment of the obligation of the contract which arose by virtue of the compliance with the prior law and to be, therefore, invalid.

So also a foreign railway company, which under the laws of a state is authorized to acquire a line of railroad therein, upon such acquisition becomes vested with the right to use and operate the same as a common carrier and that right cannot be impaired by the subsequent imposition of conditions not contemplated at the time of the acquisition.

Seaboard Air Line v. *Railroad Commission,* 155 Federal, 792.

Railway Company v. *Ludwig*, 156 Federal, 152.

Western Union Telegraph Company v. *Julien*, 169 Federal, 166.

Railroad Company v. *Cross*, 171 Federal, 480.

In *Wilmington Railroad* v. *Reid*, 13 Wall., 264, it was said:

> "Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property and of the most valuable kind, as it can not be taken for public use even without compensation."

California v. *Pacific Rld. Company*, 127 U. S., 40.

The annual license tax levied under the law of 1907 is a tax upon corporations alone. It is levied on each corporation for the license or privilege of transacting its business as such corporation within the state. It is for the same license or privilege which the corporation purchased by paying the bonus required by the law of 1897. Upon its face it purports to be imposed upon every corporation "*in addition* to the fees and taxes now provided for by law." If the state might after exacting the bonus provided for in the law of 1897 subsequently require an additional annual payment based upon the entire capitalization there is no reason why it might not at each subsequent session of its legislature require the payment of an additional bonus equal to that originally paid in for the privileges

which every corporation complying with the law of 1897 had the right to assume they had obtained thereby.

The statute of 1907 even so far as it refers to domestic corporations can not be regarded as an amendment of their charters. It purports to be passed merely as a revenue measure.

> *American Smelting & Refining Co.* v. *Colorado, supra.*

However that may be the only power reserved under the Colorado Constitution in respect to such amendments is that found in Section 3, Article XV, of the Colorado Constitution reading as follows:

> "The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing or revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators."

In passing the law of 1907 the legislature however did not express any opinion that the same was passed as an alteration of the charters of corporations which had complied with the law of 1897 and that such charters were injurious to the citizens of the state. Moreover it would have been manifestly unjust to the incorporators after exacting from them pay for their privileges under the law of 1897 to by a subsequent statute attempt to exact additional compensation or to tax their franchises or privileges which were already taxed as property. The limitation upon the legislature to amend is that "no

injustice shall be done to the corporators" by such amendment; that is, the rights granted can not be destroyed or materially impaired by a subsequent law imposing new and onerous conditions.

Pennsylvania Railroad Co. v. *Philadelphia County,* 220 Pa. St., 100, 68 Atlantic, 676.

But amendments can not affect rights or privileges obtained for a valuable consideration, and which have become vested.

People v. *O'Brien, et al.,* 111 N. Y., 53, 18 N. E., 692.

II.

THE STATUTE OF 1907 AS APPLIED TO THE PLAINTIFF IMPOSES AN UNJUST BURDEN UPON INTERSTATE COMMERCE AND IS, THEREFORE, INVALID.

The railroad which the plaintiff acquired in the State of Colorado was and is being used in the carrying on thereover of both state and interstate commerce and is used in connection with its line of railway in other states and territories. Its interstate business carried thereon is so intimately connected with its state business that to impose a tax or fee based upon its entire capital stock as a prerequisite to using its railroad in the state for the conduct of state business would plainly and unquestionably impose a burden upon the entire business of the Railway Company and thus in the end amount to a regulation of its interstate commerce.

In *Henderson et al.* v. *Mayor of the City of New*

York, et al., 92 U. S., 259, 268, this court said in holding a statute of New York invalid as a regulation of foreign commerce:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In determining whether a state statute amounts to a regulation of interstate commerce this court will look at the practical operation and effect thereof.

In *Galveston, Harrisburg, etc. Ry. Co.* v. *Texas*, 210 U. S., 217, Mr. Justice Holmes delivering the opinion of this court, said on page 227:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Now the amount of the tax in question is not measured by the amount of business done within the state but is measured by the entire capital stock of the corporation which capital stock represents the business, state and interstate, within and without the state, as well as the entire property of the Company.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S., 1, a fee based upon the entire capital stock of the Telegraph Company was imposed for the privilege of doing its local business as a foreign corporation within that state. It was held that the statute in that case was void as imposing a direct

burden and tax on interstate business of the company because imposed upon all of its capital stock representing all of its interests and property within and without the state.

See also:

Pullman Company v. *Kansas*, 216 U. S., 56
Ludwig v. *Western Union Telegraph Co.*, 216 U. S., 146.

It logically follows from the above cases that the annual license tax based upon the entire capital stock of the Railway Company, which is engaged in, and uses the same property both for state and interstate business, as the prerequisite for the right to carry on even its local business on its railroad in the state, is invalid as a regulation or imposition upon its interstate business.

But it may be said if this be true that then the statute of 1897 was also invalid for the same reason. However that might be, the state having passed such legislation, having exacted the fee and retaining the benefits derived under the statute, would be in no position to set up its unconstitutionality as against one who had complied with such statute.

See

Daniels v. *Tearney*, 102 U. S., 421.
Willis v. *Board of Commissioners*, 86 Federal, 872.
Butler v. *Ellerbe*, 44 So. Car. 269, 22 S. E., 432.
Cooley's Const. Lim., 7th Ed., p. 364n.

It would be difficult to understand how the state itself could set up the invalidity of such statute enact-

ed by its own legislative agency. No doubt there are some constitutional limitations which are adopted for the protection of the state itself, but as a general rule limitations upon the exercise of legislative power are intended for the benefit of the individual. The implied limitation of the state's power, in the above instance, by virtue of the vesting in Congress of exclusive power to regulate interstate commerce, is one intended for the benefit and protection of individuals and not of the states. Therefore, the state would be in no position to assert a right under the federal constitution as against its own statute claimed to be in conflict therewith.

Again, the license tax is imposed upon "every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado." On failure to pay such tax such corporation shall "forefeit its right to do business within the limits of this state." But the Railway Company between its stations within the limits of the state carries mail for the general government under contract, such roads being designated under the Revised Statutes, Section 3964, as "post roads." Yet the license tax is imposed in respect to or including such business. Again, within the limits of the state it does many acts which constitute a part of interstate commerce, such as soliciting therein interstate business, issuing bills of lading covering interstate shipments, selling tickets covering interstate transportation, etc., all being business done within the limits of the state. As the statute does not distinguish between intrastate and

interstate business done therein it is wholly void because the court is not a liberty to read into the statute what is not found there.

Allen v. *Pullman Palace Car Co.*, 191 U. S., 171.

In so far as the statute also includes the business of the Railway Company as a federal agency, namely, the carrying of the mails within the state, and that business is not excluded but rather included, the entire act is void.

III.

THE STATUTE OF 1907 IS IMPOSED UPON PRIVILEGES AND RIGHTS BEYOND THE JURISDICTION OF THE STATE OF COLORADO AND, THEREFORE, DEPRIVES THE RAILWAY COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The annual corporation license tax is imposed upon the entire capital stock of the Railway Company. If that capital stock be viewed as representing the property and franchises of the Railway Company then clearly the tax would be void because the property and franchises of the Railway Company located within the state are taxed as property upon the advalorem basis and a tax upon the capital stock representing the property would be a tax upon property already taxed. It would also be invalid as a tax upon property the greater part of which is located beyond the jurisdiction of the state.

If the tax be regarded as one levied upon capital stock *eo nomine* regardless of the value of the same

or the property represented by it, then it would be levied upon the privilege of the corporation exercised in the issuance of capital stock. But the privilege of the plaintiff Railway Company in respect to the issuance of its capital stock was derived from the laws of Kansas. The capital stock of a corporation can not be taxed except by the state which creates the corporation and grants the privilege, or except where the shares of stock may be actually held, in which latter event then only upon its value.

But a franchise or privilege granted by another state would not be subject to the taxing power of Colorado.

Louisville, etc., Ferry Company v. *Kentucky,* 188 U. S., 385.

California v. *Pacific Rld. Co.,* 127 U. S., 2.

Of course, a tax levied upon or in respect to property without the jurisdiction of the state is also clearly invalid.

Delaware, L., etc., Railroad v. *Pennsylvania,* 198 U. S., 341.

Union Transit Company v. *Kentucky,* 199 U. S., 194.

In either instance such a tax would be an attempt to deprive the party taxed of its property without due process of law. The tax in question makes no attempt to separate or distinguish that which might be within the jurisdiction of Colorado and that which is beyond its jurisdiction. The entire tax or imposition would, therefore, necessarily fall.

California v. *Central Pacific Rld. Co.,* 127 U. S., 1.

IV.

PAYMENT OF THE TAX BY PLAINTIFF WAS INVOLUNTARY AND IS, THEREFORE, RECOVERABLE FROM THE DEFENDANT IN A LEGAL ACTION.

The tax was demanded under authority of a statute which authorized the imposition of heavy penalties for failure to pay the same promptly and forfeiture of plaintiff's right to do business within the state until such tax should be paid. It was imposed as a condition upon the right of the plaintiff to carry on its business for the succeeding year. Plaintiff, therefore, paid the tax under protest, notifying the State Treasurer that an action would be brought against him to recover the amount back. By such payment an unseemly conflict with the State authorities was avoided and a simple method resorted to for the purpose of testing the validity of the exaction. Payment by the defendant was not voluntary as the parties were not on an equal footing.

While there is some conflict in the expressions found in the opinions of various courts as to what constitutes an involuntary payment, some of them going to an absurd extent, the better and more sensible view is that entertained by the federal courts. The matter was carefully considered in an able opinion of Mr. Justice Matthews in *Swift Company* v. *United States,* 111 U. S., 22, in which it was held that a payment made to a public officer in discharge of a fee or tax illegally exacted was not such a

voluntary payment as would preclude the party from recovering it back. In that case he says:

> "The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.*"

Further on he states:

> "If a person illegally claims a fee *colore officii,* the payment is not voluntary so as to preclude the party from recovering it back."

The amount involved in that case was on account of commissions on stamps purchased by plaintiff for use in its business. No formal protest was made at the time.

In *Erskine* v. *Van Arsdale,* 15 Wallace, 75, it was held that taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to recover them.

In *Robertson* v. *Frank Brothers Company,* 132 U. S., 17, it was held that the payment of money to a customs official to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one. In the opinion Mr. Justice Bradley said on pages 22 and 23, referring to an earlier case:

> "In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained

of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress, is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each."

See, also,

United States v. *Edmonston,* 181 U. S., 505, 506.

In *Arkansas Building Association* v. *Madden,* 175 U. S., 269, the court held that injunction would not lie to enjoin the collection of a fee imposed upon foreign corporations in order to obtain a permit to transact their business in the state upon the grounds stated on page 273, as follows:

"The penalty denounced on failure to pay is the forfeiture of the right to do business in the state, and complainant averred that if that forfeiture were declared it would be subjected to irreparable injury and a multiplicity of suits.
* * *

But the bill of complaint did not set forth any facts tending to show that complainant could not escape the forfeiture by payment of the two

hundred and five dollars under protest, and recover back the money so paid if the law should be held void.

We assume that the payment would, under the circumstances detailed, be compulsory and not voluntary, and no reason is perceived why the rule permitting recovery back would not apply.

That rule as applicable here is that an action will lie for money paid, under compulsion, or an illegal demand, the person making it being notified that his right to do so is contested."

In *Philadelphia* v. *Diehl,* 5 Wallace, 720, an action of assumpsit was brought to recover sums paid under protest. It did not appear that there was anything else except this protest to show the payment of the tax was involuntary. The court, however, said:

"Appropriate remedy to recover money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received." (Citing cases.)

"When a party, knowing his rights, voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress for the injury; but when the duties or taxes are illegally demanded, and he pays the same under protest, or gives notice to the collector that he intends to bring a suit against him to test the validity of the claim, the collector may be compelled to refund the amount illegally exacted."

The result of the federal decisions is stated by the Circuit Court of Appeals, Third Circuit, in *Herold* v. *Kahn,* 159 Federal 608, which was a suit brought to recover an inheritance tax paid under protest. On the point as to whether the payment was voluntary or involuntary, the court said:

> "In support of the first contention, counsel for plaintiff in error cites a number of decisions of the Supreme Court, from which the proposition is sought to be deduced that, in addition to the protest, there must be disclosed something like actual duress, under which the payment sought to be refunded is made, as, where duties are paid in order to obtain possession of the goods held in custody of a collector of customs. Undoubtedly in such cases, and especially where the goods are perishable, the owner or claimant is compelled to pay the duties, in order to obtain possession of his property and avoid the loss incident to its detention. But these are not the only cases in which payment under protest will support an action for a refunding of money paid. Every demand by one clothed with official legal authority to make the demand, imposes a certain compulsion on the one upon whom the demand is made. Such a demand is always exigent and places a recusant in a position of disadvantage. Especially is this so in regard to the payment of taxes, state or national. The proper administration of the fiscal affairs of the government, require that the payment of taxes should not be delayed by disputes as to their legality, but that the taxes should first be paid and all questions in regard to them be determined in suits brought for their refunding. It is a wise policy, therefore, that encourages the payment under protest of disputed taxes. Though there is some conflict in the dicta of the Supreme Court, we think that the true doctrine is that, when taxes are paid

> under protest that they are being illegally exacted, or with notice that the payor contends that they are illegal and intends to institute suit to compel their repayment, a sufficient foundation for such a suit has been established. *Chesebrough* v. *U. S.*, 192 U. S., 253; *City of Philadelphia* v. *Collector*, 5 Wall., 720, 731."

In *Scottish Union & National Insurance Co.* v. *Herriott*, 109 Iowa, 606, 80 N. W., 665, it was held that the payment by a foreign corporation, under protest, of a license tax imposed by a state law claimed to be unconstitutional, would not be deemed voluntarily made when it was compelled to pay it to protect its property and continue its business in the state. In the opinion it is said:

> "Plaintiff was bound to submit to the exaction or discontinue its business. Under such a state of facts it is clear that plaintiff's act was not voluntary, and that it may recover back the amount paid, provided it has established its claim that the act in question is unconstitutional" (Citing a number of cases.)

The railway company had a right to assume that the State Treasurer, being merely an administrative officer not clothed with the right or judicial power of passing upon or determining the constitutionality of the statute, would strictly enforce its provisions by denying the railway company the right to do business in the future.

The fee being exacted under a void or unconstitutional law payment of the same was without consideration. As was stated by Martin, Baron, in *Steele* v. *Williams*, 8 Exchequer, 625:

> "This is more like the case of money paid without consideration—to call it a voluntary payment is an abuse of language."

In that case plaintiff had applied to defendant, a parish clerk, for liberty to search the register book of burials and baptisms. He told defendant he did not want certificates, but only to make extracts. Defendant said the charge would be the same whether he made extracts or had certificates. Plaintiff searched through four years and made twenty-five extracts, for which defendant charged him 3s. 6d. each, which was paid. Held, the charge for extracts was illegal, since the statute only authorized a fee for a search, and for a certified copy; also, that the payment was not voluntary because paid under an illegal demand, *colore officii;* also, that defendant was the proper person to be sued although the money received would not be retained for his own use.

A payment under protest to avoid the imposition of penalties is involuntary.

Ratterman v. *American Express Co.*, 49 Ohio State, 608; same case, 32 N. E., 754.
Catoir v. *Watterson*, 38 Ohio State, 319.
United States v. *Rothstein*, 187 Fed., 268 (C. C. A., 7th Cir.).

Payment of water rates, under protest, to avoid shutting off of water was held involuntary.

Chicago v. *Northwestern Mutual Ins. Co.*, 218 Ill., 40.

The officer, who, under color of office exacts and receives an illegal fee or charge is not protected by law because he acts without the law and is, therefore, personally liable especially if notified at the

time that suit will be brought to recover back the amount.

Erskine v. *Van Arsdale, supra.*
Scottish Union & National Ins. Co. v. *Herriott, supra.*
Steel v. *Williams,* 8 Exchequer, 625.
Ripley v. *Gelston,* 9 Johns., 201.
Bank v. *Watkins,* 21 Mich., 483-489.
Ogden v. *Maxwell,* 3 Blatch., 319.
Elliott v. *Swartout,* 10 Peters, 137.

Whatever judgment, however, may be rendered against the defendant will be paid by the state under Section 6 of the Act of 1907, so that defendant will be amply protected if indeed he has not protected himself by retaining the amount.

The judgment should be reversed with directions to overrule the demurrer.

Respectfully submitted,

ROBERT DUNLAP,
H. T. ROGERS,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Of Counsel.

APPENDIX.

Chapter 51, Session Laws of Colorado, 1897, page 157.

"AN ACT

CONCERNING CORPORATIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Every corporation, joint stock company or association incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the Secretary of State for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint stock company or association, is authorized to have, does not exceed fifty thousand dollars; but, in case the capital stock thereof is in excess of fifty thousand dollars, the Secretary of State shall collect the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of certificate of incorporation, articles of association, or charter of said incorporation, joint stock company or association, in the office of the Secretary of State; and no such corporation, joint stock company or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the Secretary of State shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint stock company or association, until said fee shall have been paid to

him. But this Act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes.

SECTION 2. Any foreign corporation doing business in this state, that has, since the filing of its certificate in this state, increased its capital stock, without paying the fees prescribed by the law of this state at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this Act, and it is hereby made the duty of the Secretary of State to at once cause action to be brought against any foreign corporation for recovery of such fees, and a certified copy of the certificate of such increase, on file in any foreign state, shall be sufficient evidence to sustain a judgment for the amount of such fees, and an action in the nature of a writ of quo warranto shall lie against any foreign corporation to test its right to exercise corporate franchises in this state.

SECTION 3. The Secretary of State shall not file or record in his office any certificate of paid up stock, certificate of impression of corporate seal or other paper of any corporation or association, nor issue any certificate to any corporation or association unless the articles of incorporation of said company are already on file in his office, nor unless all fees prescribed by this Act shall have been paid.

SECTION 4. All acts and parts of acts inconsistent with this Act are hereby repealed.

SECTION 5. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage.

Approved April 13, 1897."

Chapter 211, Session Laws of Colorado, 1907, pages 548 et seq.

"AN ACT

IN RELATION TO PUBLIC REVENUE AND REPEALING ALL PREVIOUS ACTS OR PARTS OF ACTS IN CONFLICT HEREWITH.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. That in addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this state, shall pay, on or before the first day of May, A. D. 1907, and on or before the first day of May of each year thereafter, an annual state corporation license tax to the Secretary of State of the State of Colorado, as follows: Two cents upon each one thousand dollars of its capital stock.

SECTION 2. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, in addition to the fees and taxes now provided for by law, shall pay, on or before the first day of May, A. D. 1907, and on or before the first day of May of each year thereafter, to the Secretary of State of the State of Colorado, an annual state corporation license tax, as follows: Two cents upon each one thousand dollars of its capital stock.

SECTION 3. Every corporation which shall have failed to pay the tax provided for in sections one and two of this act shall, by reason of such failure be liable to an action of debt, to be commenced by the attorney general in the name of the people of the State of Colorado, for the recovery of such tax, and proof of notice of liability for such tax from the Secretary of State, shall not be necessary to the prosecution and maintenance of such suit and recovery of said tax.

SECTION 4. It shall be the duty of the Secretary of State, immediately upon the passage of this Act,

and on or before the first day of February annually hereafter, to notify every corporation liable to tax hereunder of the time when said tax is due, and said notice shall contain a copy of this act.

SECTION 5. Nothing in this act shall be construed as imposing a license tax upon corporations strictly for educational, social, literary, scientific, religious or charitable purposes, or ditch or irrigation corporations whose property is exempt by law from taxation, or upon charters incorporating Masonic lodges, Odd Fellows lodges, or other fraternal or benevolent societies.

SECTION 6. The Secretary of State shall, within thirty days after the receipt of any moneys collected by him under the provisions of the foregoing sections, whether paid under protest or not, pay the same into the general treasury of the state, and shall take, at the time of such payment, a receipt or receipts from the State Treasurer, showing upon the face there of the exact amount of such moneys paid to said Treasurer and on what account and from what source the same was derived. If it shall be determined in any action at law or in equity that any corporation has erroneously paid said tax to the Secretary of State, upon the filing of a certified copy of the judgement (judgment) or decree, as the case may be, with the Auditor of State, the latter is hereby authorized to draw a warrant upon the State Treasurer for the refund of such tax and the State Treasurer is hereby authorized to pay such warrant. The Auditor of State shall also give notice to the Secretary of State of such refund, so that he may make the proper entries upon his books.

SECTION 7. Every corporation which shall have failed to pay the tax provided for by this act, shall, by reason of such failure, forfeit its right to do business within the limits of this state until such tax is paid; and every such corporation in default for said tax after the first day of May of each year, shall, in addition to said tax, pay a penalty of ten per cent. of said tax for every six months or fractional part of six months during which said tax may be de-

linquent; but upon paying said tax and penalty such corporation shall forthwith be relieved from the forfeiture of its right to do business within this state by reason of such failure.

SECTION 8. In addition to the action of debt, heretofore authorized for the recovery of the tax and penalty imposed by this act, and as a further means for the enforcement of the provisions of this act, the attorney general may commence an action of quo warranto to suspend the right of any delinquent corporation to carry on business within the limits of this state until such tax is paid.

SECTION 9. It shall be the duty of the Secretary of State, on or before the first day of July annually, to furnish the attorney general with a list of all corporations which have failed or neglected to pay said tax, together with a statement of the amount due, including penalty, if any.

SECTION 10. For the purpose of the foregoing tax, the fiscal year for basing such tax shall begin with May first of each year and end April thirtieth of the succeeding year.

SECTION 11. Sections 64, 65, 66, 67, 68 and 69, of Chapter three of the Session Laws of 1902, are hereby repealed; provided, that the repeal of the aforesaid named sections and the provisions of this act shall not have, in any manner, the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty or liability which shall have accrued under the said sections repealed, and such sections shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions for the enforcement of such penalty or liability, and for the purpose of sustaining any judgement (judgment), decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions, imposing, inflicting or declaring such penalty or liability.

SECTION 12. Whereas, in the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.

Approved April 1st, 1907."

Chapter 48, Session Laws of Colorado, 1893, pages 88, 89, 90.

"AN ACT

TO AMEND SECTION TWENTY-FOUR (24) OF CHAPTER NINETEEN (19) OF THE GENERAL STATUTES OF THE STATE OF COLORADO, ENTITLED 'CORPORATIONS,' THE SAME BEING GENERAL SECTION TWO HUNDRED AND SIXTY (260) THEREOF.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. That Section 24, of Chapter 19, of the General Statutes of 1883, the same being general section two hundred and sixty, be and the same is hereby amended so as to read as follows: 260. Sec. 24. Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state except as provided for in this act, and no corporation doing business in this state, incorporated under the laws of any other state, shall be permitted to mortgage, pledge or otherwise encumber its real or personal property situated in this state, to the injury or exclusion of any citizen,

citizens or corporations of this state, who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state, until all its liabilities due to any person or corporation in this state at the time of recording such mortgage, have been paid and extinguished; provided, however, that if any foreign corporation other than those expressly mentioned herein, intending or desiring to mortgage any or all of its property for any debt created or to be created in any other state, shall give notice of such intention or desire by publication for six (6) successive weeks prior thereto, in some daily or weekly newspaper printed within the county wherein the property so intended or desired to be mortgaged is situated, or if there be no such newspaper, by posting such notices in five (5) public places within such county, requesting all citizens and corporations of this state, having any claims or demands of any kind or nature whatsoever against the said foreign corporation, to file the same duly verified with the county clerk of the county in which such property so desired to be mortgaged is situated, on a date specified in such notice, which date shall be subsequent to the date of the last publication of such notice or in case of failure so to file such claim or demand, then and in such case, a mortgage given by such foreign corporation to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state, who shall fail to file his or its claim.

Approved April 8, 1893."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1911.

No. 162.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

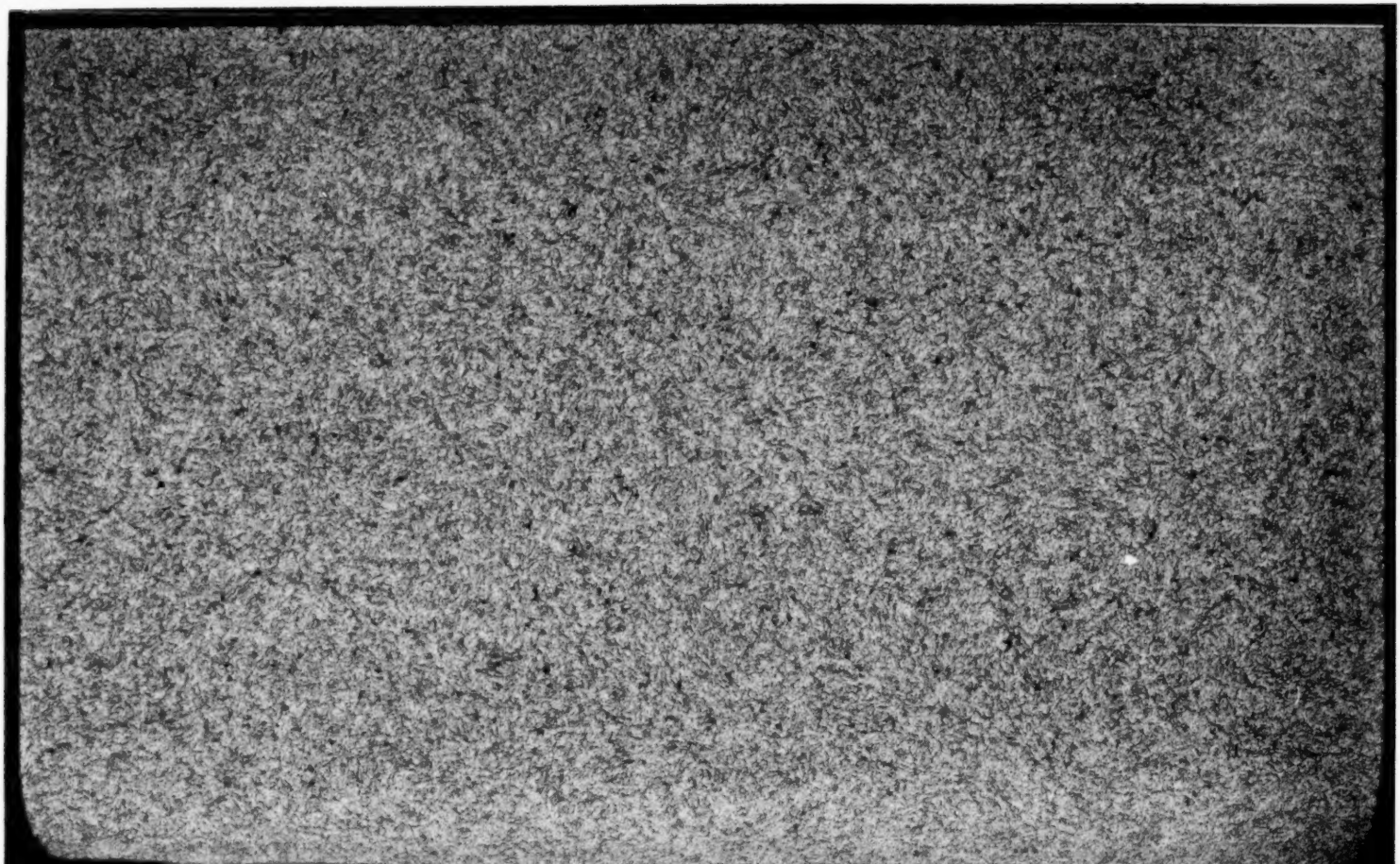
vs.

TIMOTHY O'CONNOR, DEFENDANT IN ERROR.

REPLY BRIEF.

ROBERT DUNLAP,
H. T. ROGERS,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Counsel.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1911.

No. 162.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

TIMOTHY O'CONNOR, DEFENDANT IN ERROR.

REPLY BRIEF.

Only two grounds are urged as a defense:

1. The payment was voluntary.

2. The money was collected by defendant as Secretary of State under the statute which required him to afterwards pay the same into the general treasury.

It was alleged the Secretary of State and the Attorney-General threatened, unless the tax was

In

forthwith paid, to forthwith subject plaintiff to the penalties provided in the act; that to avoid the liabilities and penalties imposed in said act plaintiff paid the tax amounting to $7,629.72 and accompanied it with a written protest against the payment on the ground that the act was unconstitutional and void, and no warrant existed for imposing, levying, and collecting of such a tax; that the payment was made involuntarily and under protest to avoid the liabilities and penalties imposed by the act.

Section 7 of the act of 1907 in question provided:

> "Every corporation which shall have failed to pay the tax provided for in this act shall, *by reason of such failure, forfeit* its right to do business within the limits of this State *until* such tax is paid; and every such corporation in *default* for said tax *after the first day of May of each year* shall, in addition to said tax, pay a *penalty* of *ten per cent* of said tax *for every six months or fractional part of six months* during which said tax may be delinquent; but upon paying said tax *and penalty* such corporation shall be *relieved* from the *forfeiture* of its right to do business within this State by reason of such failure."

Thus immediately upon default the right to do business is forfeited and remains forfeited until the tax and accrued penalties are paid. During such period of refusal the foreign corporation as

to business within the State is an outlaw. The comity which permitted it to do its business therein is withdrawn. Its right is forfeited. Its acts as a corporation are not only without legal authority but are against the authority and policy of the State. It would not be heard to enforce obligations in the State courts and it would be subject to multitudinous and harassing lawsuits attacking its rights and acts because of this alleged want of authority to transact its business in the estate. It would be harassed and annoyed and its business jeopardized.

This alone showed a case of urgent necessity to comply with the illegal demand of defendant.

It is true section 8 of the act authorized, *in addition* to a recovery of the tax and penalties and *as a further means of enforcement*, *quo warranto* proceedings by the Attorney-General to suspend the right to carry on business until the tax is paid. But that is merely a method of securing a judgment of ouster and does not relieve or dispense with the interim forfeiture provided in section 7.

But section 7 also imposes a heavy penalty for failure or refusal to promptly pay the tax. Twenty per cent a year is the penalty for the privilege of testing the validity of the statute or defending against its enforcement if the defendant therein should be mistaken. Why should one be forced to subject himself to such a penalty to determine the validity of the statute? The statute purposely

imposed such a heavy penalty to force a prompt compliance.

It has taken plaintiff three years to have a demurrer to its complaint passed upon by this court. Assuming the State would promptly bring suit to collect the tax and penalties through the State courts, it would be about five years before the case could be reached and decided by this court; by which time the corporation would run the risk of being penalized one hundred per cent, and the annual taxes payable in the interim would be bearing similar penalties. The law is not so certain that one should be forced to take such risks to have his constitutional rights determined when a sane, safe, and orderly method without such risks may well be sanctioned.

It is virtually admitted that defendant by virtue of his position received over seven thousand dollars of plaintiff's money to which neither he nor the State are lawfully entitled. Can they now retain it merely on pretense that technically defendant paid the money voluntarily, though it is admitted it protested at the time and paid to avoid penalties or risk of the same as well as of jeopardising the legality of its business transactions within the State?

Any business man would act as did plaintiff under the pressure of such threats and the risk of such penalties. The correct and reasonable rule is that set forth in cases cited in our brief in chief.

There are many other instances in which the payment may be involuntary than as sometimes narrowly stated, to prevent immediate seizure of person or property. Such a narrow rule is not sufficient to meet the justice of all cases.

Thus, in Railroad Company *vs.* Commrs., 98 U. S., 543, cited by our opponents as their strongest case, it is said the payment must be deemed voluntary where made "without an immediate and *urgent necessity therefor, or* unless to release his person or property from detention, *or* to prevent an immediate seizure of his person or property." In that case it was claimed a part of the lands of the company were not taxable—patents not having been issued. The treasurer had not even personally demanded the taxes, but the railroad company paid the entire taxes assessed, legal and illegal, and its protest contained no specification of illegality or statement as to what property was wrongfully included. The protest was in the most general terms. On page 543 the court said:

> "Before these payments were made there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way."

There the payment was not made as in this case to avoid the risk of heavy penalties and to protect the right to continue in business in an orderly way free from question or assaults upon such right.

Here there is stated an immediate and urgent necessity to comply with the demand. It was to avoid the risk of penalties and of being treated in the meantime as an outlaw and of having its numerous business transactions made questionable. It made the payment to preserve its lawful right to do business against attacks.

In U. S. *vs.* Cuba Mail S. S. Co., 200 U. S., 488, cited by defendant, suit was brought to recover for stamps voluntarily purchased and affixed to a ship's manifest and canceled without notice or protest. On page 492 it is said:

> "It is alleged that the stamps were purchased from Walter H. Steiner, a dealer in internal revenue stamps, on various days subsequent to January 1, 1900, and that Steiner purchased them from the collector of internal revenue, and the proceeds thereof were duly paid over to the United States.
>
> "In this case, as in the *Chesebrough case*, the collector was not informed at the time of the purchase of the particular purpose for which the stamps were to be used, and no intimation was given him, written or oral, that the defendant in error claimed that the law regarding such stamps was unconstitutional, and that it was making the purchase under duress."

In Chesebrough *vs.* U. S., 192 U. S., 253, also cited by defendant, there was a purchase of stamps from the collector without intimating the purpose of the purchase and without protest or notice of the unconstitutionality of the statute, and it was held that refusal of a vendee to accept a deed without the stamps required was not duress to relieve the vendor from making protest or giving notice at the time of purchase of stamps from the collector. On page 264 the court refers to the necessity of a proper protest to protect the Government in conducting the extensive business of dealing in stamps. It is true the court refers to certain cases in Wallace's Reports, where actions against collectors were maintained without a protest being made, "because the internal revenue acts warranted the conclusion as a necessary implication that Congress intended giving the taxpayer such remedy."

But the same implication is found in the Colorado statute. Section 6 provides:

> "If it shall be determined in any *action at law* or in equity that any corporation has erroneously paid said tax to the Secretary of State, upon filing of a certified copy of the judgment or decree, as the case may be, with the Auditor of State, the latter is hereby authorized to draw a warrant upon the State treasurer for the refund of such tax and the State treasurer is hereby authorized to pay such warrant."

Plaintiff could not sue the State or the State Treasurer as such for that would be an action against the State and not maintainable without express authority (Smith *vs.* Reeves, 178 U. S., 436, 437, 439); so the only action at law maintainable was one against the officer individually who made the unlawful collection. This statute, like the revenue acts of Congress above referred to, recognizes such an action as appropriate.

In Little *vs.* Bowers, 134 U. S., 547, also cited by our opponents, there was simply involved the jurisdiction of this court. A tax was voluntarily paid pending litigation over its validity in this court. This being shown the writ of error was dismissed as there was no controversy left.

In Radich *vs.* Hutchins, 95 U. S., 210-213, also cited by our opponents, the transactions were held unlawful and as affording no basis for a legal cause of action. There plaintiff to obtain permission from the rebel government in Texas in 1864 to export cotton sold a certain amount at a nominal price to rebel officers and delivered to them for its use an equal amount of other cotton which he subsequently redeemed by paying a stipulated sum therefor. *Held,* This was giving aid and comfort to the enemy and out of such illegal transactions no enforcible demand against such officers could arise. The payment was voluntary; no objection made at the time and it was made for a permit to export cotton contrary to the laws of the United States.

"To render a payment voluntary in the proper sense of the word, the parties concerned must stand upon equal terms." Abbott, C. J., in Morgan *vs.* Palmer, 4 D. & R., 283.

A payment is not regarded as voluntary if necessary to avoid serious injury or risk in respect to property.

State *vs.* Nelson, 41 Minn., 25, 27, 28, 29.

As further supporting Steele *vs.* Williams, 8 Exch., 625, and as holding in such cases, it would be *contra aequm et bonum* that defendant be allowed to retain money illegally collected *colore officii*. See:

Brisbane *vs.* Dacres, 5 Taunt., 153.

Dew *vs.* Parsons, 2 B. & A., 562.

On moral duress see:

Atkinson *vs.* Denby, 6 H. & N., 778.

Morgan *vs.* Palmer, 2 Barn. & Cress., 729, 734, and 737.

Robertson *vs.* Frank Brothers Co., 132 U. S., 23.

Payment under protest of illegal tax for privilege of doing or continuing in business and to

avoid penalties and disabilities incurred by refusal, is regarded as involuntary.

Western Union Tel. Co. *vs.* Mayer, 28 Oh. St., 521, 527, and 528.

Baker *vs.* Cincinnati, 11 Oh. St., 538, 539, 540.

Hendy *vs.* Soule, 1 Deady, 400.

Harvey & Boyd *vs.* Town of Olney, 42 Ill., 336.

The action is properly maintainable against defendant individually, as he made the illegal demand and received the money with notice of protest. It is alleged he still retains the money, but that is not important. He could protect himself and will in fact be protected. He should be held liable because the State could not be sued and plaintiff would be remediless. His action under an unconstitutional statute is not that of the State. It is unlawful and he cannot set up the statute because, being void, it affords no lawful authority or protection.

Virginia Coupon Cases, 114 U. S., 270, 286-291.

The action should be maintained, as he will be reimbursed and protected by the State. The Attorney-General of the State appears for him and fights his battle. If the action is not maintainable plaintiff suffers an unjust loss. In this

roundabout way only can the State be reached and a wrong corrected.

This court has held in two cases that injunction to restrain the collection of a license tax would not be maintainable because plaintiff might pay under protest and recover back at law.

Shelton *vs.* Platt, 139 U. S., 591.

Arkansas Bldg. Ass'n *vs.* Madden, 175 U. S., 269.

But if injunction to restrain the collection were maintainable it would not do away with the common-law action. The action of assumpsit to recover back money illegally demanded and received, as for money had and received for the use of plaintiff (from whom it was wrongfully taken) under the benign fiction of the common law, is equitable in its nature and should be liberally enforced in the furtherance of justice and fair dealing.

Reduced to its last analysis, defendant's contention is that if a corporation pays an unlawful tax it loses all because by a legal fiction it is presumed conclusively to have done so voluntarily although protesting against the legality of the demand and only paying to avoid the risk of penalties and injury to its business. If it does not pay it runs the risk of having imposed upon it heavy penalties should it or its lawyers be mistaken as to the ultimate opinion of the courts as to the validity of the statute.

Is it a just rule of law which compels the taxpayer to take such risks or suffer an unjust loss?

The right to contest the validity of a statute only in an action to collect a tax and heavy penalties for refusal to pay and accompanied by an interim forfeiture of the right to do business is in no sense a just substitute for the right to pay under protest when demand *colore officii* is made and then to recover back in an action for money had and received.

The complaint sufficiently alleged the payment to have been made involuntarily. We respectfully submit the judgment should be reversed with directions to overrule the demurrer to the complaint.

ROBERT DUNLAP,
H. T. ROGERS,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 162.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR.

vs.

TIMOTHY O'CONNOR, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The defendant in error was secretary of state of the State of Colorado from January, 1907, to January, 1909. In 1907 the Colorado legislature passed an act (chapter 211, Session Laws of Colorado, 1907, pages 548 et seq.) requiring the payment by foreign and domestic corporations of an annual state corporation license tax on or before May first of each year. The penalties for failure to pay such tax were:

1. An action of debt to recover the amount of the tax.

2. An addition to the amount of the tax of 10 per cent thereof for every six months' default.

3. An action of quo warranto by the attorney general to suspend the right of a delinquent corporation to do business in the state.

On May 2, 1907, the plaintiff in error paid to defendant in error, as secretary of state, such annual corporation license tax, without an action of debt having been instituted, a proceeding in quo warranto commenced, or any other action taken or penalty inflicted by the officials of the State of Colorado. The payment was made under a general protest.

On February 11, 1909, and after the expiration of defendant in error's term of office as secretary of state, the plaintiff in error brought suit in the United States Circuit Court for the District of Colorado against the defendant in error individually to recover the amount of the tax so paid.

The opening paragraph of the statement of plaintiff in error may perhaps be criticised, in that it might very reasonably be assumed therefrom that the license fee in question had been adjudged illegal and the law under which it was paid found to be unconstitutional. Enough of the complaint is set out thereafter, however, to exhibit to the court the fact that such license fee is claimed to be illegal by plaintiff in error, and such law is claimed to be unconstitutional, without other ground than that contained in the argument of the brief on behalf of plaintiff in error.

ARGUMENT.

The contentions of the plaintiff in error are embraced under four heads:

I. When the railway company, in 1899, paid to the State of Colorado the fees required of foreign corporations by the law of 1897, and otherwise complied with the laws then in force, it obtained a vested or contract right to transact its business as a foreign corporation within that state; and the subsequent law of 1907, which attempted to impose an additional license tax for the same privileges, impaired the obligation of the contract between the railway company and the state, created by virtue of a compliance with the law of 1897.

II. The statute of 1907, as applied to the plaintiff, imposes an unjust burden upon interstate commerce and is, therefore, invalid.

III. The statute of 1907 is imposed upon privileges and rights beyond the jurisdiction of the State of Colorado and, therefore, deprives the railway company of its property without due process of law.

IV. Payment of the tax by plaintiff was involuntary and is, therefore, recoverable from the defendant in a legal action.

To these should be added a fifth:

Is plaintiff entitled to this remedy against this defendant?

Only the two questions last named above will be discussed, because it is believed that the defendant's contentions are correct upon these points, and that the court will not care to consider the constitutional questions involved, under the familiar rule stated by Justice Cooley:

> "Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. * * * In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable."
>
> *Cooley's Constitutional Limitations*, (7th Ed.), p. 231.

The same rule has been briefly stated in a recent decision by the Supreme Court of Colorado, as follows:

> "It is thoroughly established in this jurisdiction, to which the citation of our decisions is unnecessary, that a constitutional question will not be passed upon unless it is essential to the determination of the case in hand."
>
> *Gale vs. Statler*, 17 Colo., 72, 74.

See also:

Ex parte Randolph, 2 Brock., 447; Fed. Cases No. 11558.

People vs. Board of Supervisors, 41 N. Y., 288, 291.

Cumberland & Ohio R. R. Co. vs. Barren County Court, 73 Ky., (10 Bush), 604, 612.

I.

THE PAYMENT BY PLAINTIFF WAS VOLUNTARY AND IS NOT RECOVERABLE,

The statute under the authority of which payment was made of the tax now sought to be recovered by the plaintiff provided as follows for the enforcement of the tax, as appears from the appendix to the brief of plaintiff in error:

> "Section 3. Every corporation which shall have failed to pay the tax provided for in sections one and two of this act shall, by reason of such failure, be liable to an action of debt, to be commenced by the attorney general in the name of the people of the State of Colorado, for the recovery of such tax, and proof of notice of liability for such tax from the secretary of state shall not be necessary to the prosecution and maintenance of such suit and recovery of said tax.
> * * * * * * * * *
> Section 7. Every corporation which shall have failed to pay the tax provided for

by this act, shall, by reason of such failure, forfeit its right to do business within the limits of this state until such tax is paid; and every such corporation in default for said tax after the first day of May of each year, shall, in addition to said tax, pay a penalty of ten per cent of said tax for every six months or fractional part of six months during which said tax may be delinquent; but upon paying said tax and penalty such corporation shall forthwith be relieved from the forfeiture of its right to do business within this state by reason of such failure.

Section 8. In addition to the action of debt, heretofore authorized for the recovery of the tax and penalty imposed by this act, and as a further means for the enforcement of the provisions of this act, the attorney general may commerce an action of quo warranto to suspend the right of any delinquent corporation to carry on business within the limits of this state until such tax is paid."

That the payment may not be recovered, if voluntary, is conceded by the plaintiff.

To constitute the payment involuntary, and so justify recovery, the plaintiff must show that the alleged compulsion was immediate; that the duress was existing; and must negative the possibility of there being any other expedient for freeing its property and business from illegal action.

A definite and exact rule of universal application, by which to determine in every conceivable case whether a payment is voluntary or compulsory, cannot, in the very nature of the subject, be laid down,

as each case must depend somewhat upon its own peculiar facts; but the courts seem to have agreed upon a few general principles which, when applied to this case, show the payment of the plaintiff to have been voluntary.

The almost unbroken line of authority may be said to agree with the general principles enunciated by this court in the case of Radich vs. Hutchins, where the plaintiff sought to recover from an official of the confederate government money paid to him, as it was alleged, under coercion, to procure a permit to export cotton. The court said that there was no averment that either of the defendants ever attempted to make any seizure of the cotton, or had any power to make such seizure, and thus defines what constitutes such an involuntary payment as will permit recovery:

> "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary—treating now the redemption of the cotton as made in money, goods being taken as equivalent for a part of the amount—there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is, that 'A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress

imposed upon it by the party to whom the money is paid.' *Baltimore vs. Lefferman*, 4 Gill., 425."

Radich vs. Hutchins, 95 U. S., 210, 213.

There must be, therefore, a threatened exercise of power believed to be possessed by the party exacting or receiving the payment over the person or property of another. The payment must be made to emancipate the person or property from an existing duress. Under the terms of the statute heretofore quoted, neither the defendant nor the attorney general of Colorado possessed any power over the plaintiff or its property. The only power conferred by that statute upon either the defendant or the attorney general was to bring an action of debt or a proceeding in quo warranto, and any exercise of power over the person or property of the plaintiff would have been by the courts upon judicial determination, in the course of which plaintiff would have had such relief as it might have been entitled to.

There was no need for the plaintiff to make payment to emancipate person or property from an existing duress, for, under the terms of the statute, the corporate existence, property or business of the plaintiff could not have been affected except upon determination of a suit which might, at the option of the attorney general, be instituted.

The forfeiture of the corporate right to do business, referred to by plaintiff under the provisions of the statute, could be made effective only through the action provided by the subsequent section 8, by the attorney general, who, in the words of the statute, "may commence an action of quo warranto to sus-

pend the right of any delinquent corporation to carry on business within the limits of this state until such tax is paid."

If it were the intent of the statute for a corporation automatically to forfeit its right to do business through failure to pay the tax, why the necessity for action by the attorney general "to suspend the right of any delinquent corporation to carry on business"? The inference is irresistible, from this provision of the statute for action by the attorney general, that the forfeiture was not intended to be effective until the adjudication of the court in an action of quo warranto. Consequently, there was no "existing duress when the plaintiff paid the tax which it now seeks to recover." Its business could go on without interruption until the action prescribed should be taken by the attorney general and an adjudication had.

The rule mentioned was again laid down by this court in the case of *Railroad Co. vs. Commissioners*, where, referring to the case of *Lamborn vs. County Commissioners*, 97 U. S., 181, the court said:

> "As that was a case from Kansas, we followed the rule adopted by the courts of that state, which is thus stated in *Wabaunsee County vs. Walker* (8 Kan., 431): 'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party

at the time of making the payment files a written protest does not make the payment involuntary.'

This, as we understand it, is a correct statement of the rule of the common law. There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances."

Railroad Co. vs. Commissioners, 98 U. S., 541, 543.

In that case the treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with the tax on the lists of the company, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. The company paid under protest against the legality of the charge. The court held the payment voluntary and denied the right of recovery.

The same doctrine has been expressly approved by this court in the cases of

Little vs. Bowers, 134 U. S., 547.

Chesebrough vs. United States, 192 U. S., 253.

United States vs. Cuba Mail S. S. Co., 200 U. S., 488.

In the case last above cited the Chesebrough case was quoted, at page 492, as correctly expressing the principle to be applied in the following language:

> "'Even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.'"

That there is no immediate and urgent necessity for the payment of a demand which can only be enforced by the decision of a court of justice would seem to be self-evident; and the court have so held.

For example, certain moneys were collected under color of provisions of acts of the legislature of New York, by which in effect a tax was imposed upon alien passengers arriving in that port, and these acts were declared unconstitutional by this court. Moneys paid to relieve the plaintiff from the accumulation of penalties, the collection of which could only be enforced by judicial proceedings, were held to be voluntarily paid and could not be recovered, the court saying:

> "It is stated in general terms, in some of the decisions, that, where money is paid to a public officer upon an unlawful demand, to save the person paying from the infliction, under color of authority, of great or irre-

parable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity and may be recovered back. But it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a court in favor of the validity of the claim made against him. There cannot be an immediate and urgent necessity for the payment of a demand which can only be enforced by the decision of a court of justice. The case of *Benson vs. Monroe*, and that of *Cunningham vs. Boston*, 16 Gray, 468, are directly in point, as deciding that the apprehension of the recovery of heavy penalties by suit, in case the demand for a small sum is not complied with, does not take the case out of the general rule."

Oceanic S. S. Co. vs. Tappan, 16 Blatchf. 296; Fed. Cases No. 10405.

And the rule was applied by the Supreme Judicial Court of Massachusetts in a similar proceeding, where, however, suit had actually been brought by the officials and the particular vessel attached, the tax being paid to dissolve the attachment and regain control of the property. The court said:

"The court deem this a plain case. It is an established rule of law, that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him,

and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law. He has, or may have, a day in court; he may plead and make proof that the claim on him is such as he is not bound to pay. This circumstance distinguishes such a case from most of those which were cited for the plaintiffs. * * *

They should have contested the demand made on them, in the suit that was instituted against them; and having voluntarily adjusted that demand, and relieved their vessel from seizure, with a full knowledge, or means of knowledge, of all the facts of their case, they cannot now be permitted to disturb that adjustment."

Benson and another vs. Monroe, 7 Cush., 125, 131, 132.

So in Missouri, where the plaintiffs had paid a demand under threats by the defendant of legal action to dispossess them, which would have destroyed their business, the right to recover the sum so paid was denied, the court saying:

"It is not claimed that there was anything more than mere words constituting the

duress. There is nothing in the case going to show that defendants ever intended to resort to anything outside of the law to vindicate their supposed rights. Generally a threat of legal process is not duress, for the party may plead and make proof and show that he is not liable.

In *Claflin vs. McDonough* (33 Mo., 412) it was declared that, to constitute duress, there must be a seizure of the property or arrest of the person, or a threat or attempt to do one or the other, or facts should be stated which tend to show, or which warrant the conclusion, that such an arrest or seizure could be avoided only by the payment of the sum demanded. The current of authorities is in accordance with the doctrine laid down by Lord Kenyon (Falliam vs. Down, 6 Esp., 26) that a voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (unless to redeem or preserve his person or goods), is not the subject of an action for money had and received."

Wolfe et al. vs. Marshal et al., 52 Mo., 167, 170.

The same rule is thus stated in an exhaustive note to the case of *Mayor of Baltimore vs. Lefferman*, 45 Am. Dec., 145, 153:

"The rule allowing a party to recover money which he has once paid, on the ground that it was paid under compulsion, is intended only for the relief of those who are

entrapped by sudden pressure into making such payments, and who have no other means of escaping an existing or imminent infringement of their rights of person or property. Where a party has time and opportunity to relieve himself from his predicament without making such a payment by a resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary and he cannot recover it. This is clearly shown in all the cases on this subject."

See also:

Johnson vs. Cook County, 53 Ore., 329.

Weber vs. Kirkendall, 44 Neb., 766, 770.

The Sonoma County Tax Case, 13 Fed., 789.

Mayor of Baltimore vs. Lefferman, 4 Gill, 425; 45 Am. Dec., 145.

2 *Cooley on Taxation*, (3rd Ed.), pp. 1495-1501.

The case last cited contains an exhaustive discussion of the English cases, showing that the rule there is the same as heretofore mentioned.

The general rule is that where an unfounded and illegal demand is made upon a person and the law furnishes him with adequate protection against it, or gives him an adequate remedy, and instead of taking the protection the law gives him or the remedy it furnishes, he pays what is demanded, such payment is deemed to be a voluntary one.

30 Cyc., 1311.

Manning vs. Polling, 114 Ia., 20, 24, 26, 27.

15

Wessel vs. D. S. B. Johnston Land and Mort. Co., 3 N. D., 160, 162, 164.

DeGraff vs. County of Ramsey, 46 Minn., 319.

The plaintiff could have enjoined any effort to enforce the collection of the tax.

Ludwig vs. Western Union Tel. Co., 216 U. S., 146.

These authorities indicate clearly the proper proceeding in such a case as the one at bar. The plaintiff should have waited until an action was brought either to collect the tax or to suspend its right to do business, and should then in such action have raised the questions which it is attempted to raise in this suit as the basis of a right to recover, or should have proceeded by injunction. Not having done so, it is, under the authorities, without remedy. Of course, the fact that it paid under protest does not make the payment involuntary.

> "The fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary."
>
> *Railroad Co. vs. Commissioners*, 98 U. S., 541, 544.

None of the cases cited in the brief of plaintiff in error established a rule contrary to that contended for on behalf of the defendant in error.

Swift & Company vs. United States, 111 U. S., 22, may be distinguished because the act establishing

the tax provided that any debt incurred or articles sold, upon which the stamp tax had not been paid, should be void, or if the same were paid for, the sum paid should be forfeited, and any person who might sue therefor should recover from the seller one-half the amount paid for his own use and one-half for the United States. (*14 Stat. at Large*, 306.)

This effectually prevented the plaintiff in that case from doing any business. It was compelled to pay for the stamps illegally. Had the statute, in the case at bar, provided that all debts to corporations should be void if they failed to pay the tax, or if, when their products had been sold and paid for, anyone might recover from such corporation one-half of such payment for his own use and the remaining half for the state's use, this case might be analogous. Under the actual circumstances, however, it is no authority for plaintiff's position.

Erskine vs. Van Arsdale, 15 Wallace, and *Philadelphia vs. Collector*, 5 Wallace, 720, are shown to have no bearing upon this point, by the Chesebrough case, 192 U. S., at page 260, where it was said:

> "In *Philadelphia vs. Collector*, 5 Wall., 730, and *Collector vs. Hubbard*, 12 Wall., 13, which were internal revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.' It is so expressly stated in the last case, p. 14. As the case of *Erskine vs. Van Arsdale*, 15 Wall., 75, followed these

> and was of the same general character, it is to be presumed that it was put upon the same ground."

As to *Robertson vs. Frank Brothers Co.*, 132 U. S., 17, a distinction may be noted at the foot of page 18, in the language of Mr. Justice Bradley:

> "To avoid this penalty and to get immediate possession of their goods (which are of a perishable nature), the plaintiffs made the addition required, and paid the increased duties that resulted."

The goods were bananas. Had the plaintiffs been deprived of the possession of their goods while they litigated the claim of the customs officials, the condition of their property at the termination of the suit may be readily imagined. The decision of the court is thus indicated on page 22, in a quotation from Maxwell vs. Griswold:

> "It suffices if the payment is caused on the one part by an illegal demand, made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment."

It is difficult to see wherein the case of the *United States vs. Edmonston*, 181 U. S., 501, supports plaintiff's contention. The opinion quotes the language used in *Swift vs. United States*, at pages 505 and 506, indicated by plaintiff in error, it is true, but the conclusion reached by the court was that the payment there involved was voluntary.

In the case of *Arkansas Building Association vs. Madden*, 175 U. S., 269, it appears that the secretary of state had power to declare a forfeiture of the right to do business (p. 271). Very different is that case from the situation here, where such forfeiture could only be declared by judicial proceedings in quo warranto, in which the law of the matter could be tested.

The case of *Herrold vs. Kahn*, 159 Fed., 608, was an action to recover money paid to the collector of internal revenue. It should be observed that the suit was against Herold as collector of internal revenue, and it was authorized by federal statute. It appears by 12 Statutes at Large, page 434, that internal-revenue collectors are made directly responsible to individuals for money erroneously collected by them or their deputies (see also sections 3220 and 3698, Rev. St. U. S.). Moreover, the decision in that case is directly in conflict with the federal authorities already cited in behalf of defendant in error, and is not supported by the authorities cited in the opinion.

In *Scottish Union and National Ins. Co. vs. Herriot*, 109 Ia., 606, the officer had authority under the law and threatened to revoke the license of the company for failure to pay. Furthermore, the remarks there made concerning the question of voluntary payment are but *dicta*, since the court held the tax legal and denied relief.

In *Steel vs. Williams*, 8 Exchequer, 625, the case was one where the plaintiff could not procure the specific services to which he had a legal right, unless he paid the illegal fee; but in the case at bar

plaintiff had and retained all its property and all its rights. All that can be said to be compulsion is the threat of the officials of Colorado, being in effect: "Pay this tax, or we will establish our legal right to it by judicial proceedings." The plaintiff lost nothing whatever by a refusal to pay. Under no interpretation of the law could any valuable thing be taken from it until the termination of legal proceedings in which the legality of the license fee would be determined. The case last cited would be analogous if the parish clerk had permitted the plaintiff to examine the register, insisting, however, that if the illegal fees were not paid he would sue for them.

Ratterman vs. American Express Co., 49 Ohio State, 608, is readily distinguished. The Ohio statute provided, not only that agents or persons acting for the express company might be subjected to penalties if the tax were not paid, but also that any railroad company would be subjected to a forfeiture equal to the sum of the tax and penalty, if it carried any money or merchandise belonging to such express company. The railroad company and its employes certainly could not be expected to subject themselves to any penalties, or litigate the legality of the tax; and, in view of the fact that such railroad companies were also subjected to penalties by reason of any delinquencies of the express company, the payment under these circumstances was held to be involuntary. The court said, at page 621:

> "With the obvious danger in view that employes and others independent of and beyond the control of the express company

would be deterred by the penalties, and refuse to carry for it packages, parcels or merchandise in the line of its business, payment of the tax by the company might well be deemed to have been made under duress and coercion and without waiver by the company of its day in court."

Catoir vs. Watterson, 38 Ohio St., 319, involves a license fee (see State vs. Hipp, 38 Ohio St.), without payment of which plaintiff was effectually barred from doing business, and it became a misdemeanor for him to proceed or for others to sell to him—various other penalties being also provided.

In *United States vs. Rothstein*, 187 Fed., 268, the payment of a fine imposed in a criminal case was held not to be a voluntary payment. This can probably be conceded without affecting the principle contended for by the defendant in error.

It appears from the very statement made with regard to *Chicago vs. Northwestern Mutual Ins. Co.*, 218 Ill., that the compulsion was immediate and the duress existing; for if payment for water rates had not been made, the water could have been shut off instantly and without legal process.

In the light, therefore, of the authorities and of the provisions of the act in question, it is difficult to see how the payment made by the plaintiff company could have been other than a voluntary payment. As has been shown, neither the secretary of state nor the attorney general could claim the right to proceed, nor could plaintiff's property or business be reached except through the courts, wherein the

question of the legality of the tax could have been litigated by plaintiff, without payment.

It is submitted that this payment was voluntary, and the plaintiff has no right to recover the amount paid to the defendant.

II.

IS THE PLAINTIFF ENTITLED TO THIS REMEDY AGAINST THIS DEFENDANT?

It is conceded by plaintiff that if the payment was voluntary a recovery cannot be had.

See also *Elliott vs. Swartout*, 10 Peters.

The question, therefore, is whether, if a payment of the character which is here shown be compulsory, it can be recovered individually from the official to whom it was made.

The law provided that all money collected under it should be paid into the state treasury within thirty days from its receipt, whether paid under protest or not.

> "Section 6. The secretary of state shall, within thirty days after the receipt of any moneys collected by him under the provisions of the foregoing sections, whether paid under protest or not, pay the same into the general treasury of the state." (Appendix, plaintiff in error's brief.)

The presumption is that the law has been complied with by the officer. Under such circumstances,

plaintiff cannot recover the sum paid to the defendant.

If the law be unconstitutional, plaintiff is one of the class to be reached by it. The burden should be upon those affected by it to establish the unconstitutionality, or take steps to prevent the collection of the amount, which could easily have been done in this case. Plaintiff cannot pay the sum required to the officer, making him thereby liable to the state, and then say: "Hold that money for me. It is true the law requires you to pay it to the state, but *I* say the law is unconstitutional."

This action can only be regarded as an action for money had and received for the use of the plaintiff. Upon no other theory could it be upheld. But it cannot be sustained upon that theory; for the moment the money is paid to defendant it becomes the property of the state, and is held for the use and benefit of the state.

This is illustrated by a Missouri case, where the plaintiff brought an action against the tax collector for Cape Girardeau County to recover taxes paid to the defendant by plaintiff's agent. The court there held that

> "After the reception of this money by the defendant as collector, it no longer belonged to the plaintiff but to the County of Cape Girardeau and State of Missouri. It was not had and received by the defendant for the use of the plaintiff, but for the use of the state and county."
>
> *Davis vs. Bader*, 54 Mo., 168, 169.

The moment payment of the amount which plaintiff now seeks to recover was made to the defendant, it became the property of the State of Colorado. In the language of the case just cited, it was had and received by him for the use of the state.

So, where an action was brought to recover the amount of tax paid to a defendant in his capacity as collector of taxes of the city of Newport, upon the ground that it was illegally assessed, the Supreme Court of Rhode Island held:

> "A collector is the agent of the town or city in collecting a tax, and the town is really the only party interested in defending it. The money paid belongs to the town and not to the collector. * * * Moreover, if a collector is held to be liable, he will be placed in this dilemma: That he must, according to his own judgment, either decide that the tax is illegal, or else collect it at the peril of paying it back again with interest and costs. If he should decide not to collect it, the town might still sue him on his bond for non-performance of duty, upon the ground that the tax was legal and collectible. It cannot be that it was ever intended to put a collector in such a position."
>
> *Fish vs. Higbee*, 22 R. I., 223, 224, 225.

In *King vs. United States*, 99 U. S., 229, where a surety on a collector's bond denied liability for money obtained, the court said, at page 232:

> "Money paid for taxes past due and received by the collector as such, and for which he gives a receipt as collector, specifying with precision the taxes for which it is paid, is public money. If it is not, whose money is it? The tax-payer has parted with it in voluntary payment of a debt due the United States. The collector appointed by the United States has received it as money paid to the United States on a debt due the United States. It is not, therefore, his money. It is the property of the United States, and within the meaning of the bond it is public money."

If the defendant holds the money in wrong of the state, it is still the money of the state, and an action on behalf of the plaintiff will not lie to recover it of him. If the defendant retains it under some agreement with the state, or for any other purpose which may be imagined, plaintiff has no claim upon it. The complainant makes it perfectly clear that the money was paid to defendant as secretary of state and as a tax. This shows that there is no privity of contract between plaintiff and defendant, and, hence, no right of action.

That an officer receiving money as such cannot be held individually liable therefor, is explicitly held in *Long vs. Fruc*, 104 U. S., 223. That was an action to recover money paid to the treasurer of a corporation for stock which was not delivered, and it was held that he was not liable personally, and that, if there was any right of recovery, it was against the company.

Indeed, the complaint in terms asserts that this defendant must follow the law regardless of all questions of its validity. Hence he had no right to retain the money, and could obtain no right or title to it except through the state.

In cases in which taxes paid may be recovered, the action is upon the theory that the defendant has received of or for the use of plaintiff money which he cannot in good conscience retain. The law by implication makes the holder of the money indebted to him by whom or for whose use it was paid. There is no such state of facts here. Not only good conscience, but positive law, requires the payment of this money to the state; and the defendant has no money belonging to the plaintiff or received for its use.

It cannot be doubted that the defendant is liable to the state for money collected for it and not turned over; and this, too, though the collection be made under an unconstitutional act—the invalidity of the law being no defense in such a suit.

> "The collector, who is in the light of an agent of the state, could not be heard to urge in his defense to a suit that the money he had received was on account of taxes which the legislature had no constitutional power to impose. The question of constitutional authority to levy the tax would properly arise between the collector and the person taxed before payment, or, after payment, between the state and such person."
>
> *Waters et al. vs. The State*, 1 Gill, 302, 308.

Is the collector, then, liable both to the state and to the plaintiff? Manifestly not. The party to whom the defendant is under obligation to pay alone may sue.

It is not disputed that one wrongfully receiving money is liable in an action for its recovery, but this money was not wrongfully received by the defendant, in the sense in which the word is used in the cases laying down that rule. He did nothing wrongful and, according to the expressed declaration of the complaint, had no right to question the validity of the law. He discharged his official duty when he accepted the money.

The federal statutes provide for suits against collectors and for the payment of judgments against them. Hence, suits against United States collectors are no precedents for actions against state collectors while in office; much less for suits against ex-officials.

The cases cited by plaintiff in error are distinguishable.

Erskine vs. Van Arsdale is said, in the *Chesebrough case*, 192 U. S., page 260, to be based upon the provisions of the internal-revenue acts, giving the taxpayer such remedy.

In *Scottish Union and National Ins. Co. vs. Herriott* it appears that the defendant in his individual capacity filed a motion to be dismissed from the case, and his motion was sustained. The court said:

> "While error is assigned on the ruling dismissing the defendant in his individual capacity from the case, appellant does not argue the assignment in its original brief, and hence it will be deemed waived."
>
> 109 Ia., pp. 607 and 608.

In *Steel vs. Williams* the defendant charged a fee not provided for by the statute. That is not this case. The tax here paid is the amount specified by the statute. Had the defendant required twice the statutory amount, or any amount in excess of that provided by statute, his personal liability would not be disputed.

Ripley vs. Gelston and *Bank vs. Watkins* rest for their authority upon *Snowden vs. Davis*, 1 Taunt., star page 359, 362, where, as in the case of Steel vs. Williams, the payment demanded by the officer was in excess of what the law authorized him to collect. The theory was that because of this excess the plaintiff could not have paid the money for the use of the principal, for the principal did not claim it. It was an act entirely in excess of authority or supposed authority by the collector. The sheriff's bailiff there levied for seven pounds, when he had authority to levy for four pounds and a fraction, and Justice Mansfield refers thus to the excess:

> "To make the argument more curious, if it had been that the plaintiff had looked at the warrant, he could not have paid the money with the view that it should be paid over to the sheriff, for he would have seen an authority to levy four pounds one shilling and sixpence only."

This distinction in these cases is noticeable in the reference to them in the opinion in Elliott vs. Swartout, at page 157. The latter case also was one involving excess dues paid to a collector, as was the case of Ogden vs. Maxwell. In the case at bar the plaintiff paid only the tax provided by the statute.

and the payment was made manifestly for the use and benefit of the state.

Examination of all of these cases seems to show that they are based uopn some statutory provision, or upon the principle that where the payment made was in excess of the amount that was justified, or apparently justified, by law, it can be recovered—where the officer has made, either fraudulently or through mistake, an excessive charge, one to which the principal does not claim to be entitled.

The true, just and reasonable rule would seem to be that money paid to an official under compulsion cannot be recovered from him individually in an action for money had and received, for it was received, not to the use or for the benefit of the individual making the payment, but for the use and benefit of the state, or other body or principal for whom the collection is made. By employing compulsion, however, the collector becomes a trespasser, and is liable for any damages done in the course of the trespass. If the compulsion causes no actual damage, then it surely is not of sufficient consequence to warrant the payment of the tax. If it threatens irreparable damage, the threat of the official may be restrained by injunction.

Section 6 of the act of 1907 is mentioned as protecting the defendant by authorizing refund of the tax upon the filing of a certified copy of a judgment or decree holding such tax erroneously paid. But a reasonable intent must be imputed to the legislature, and it is not to be supposed that the judgment referred to is one against an ex-official to which neither the state nor any of its officials are parties, and in which it might have no opportunity to litigate the claims.

It cannot be supposed that the defense of the state's rights and powers would be left by the legislature to an individual under no obligation to the state, and that the legislature would provide that the moneys of the state should be disbursed by state officers in settlement of a judgment against such individual.

CONCLUSION.

Upon these two grounds the judgment should be sustained.

Respectfully submitted,

BENJAMIN GRIFFITH,
Attorney General of Colorado:
ARCHIBALD A. LEE,
Deputy Attorney General,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 162.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

TIMOTHY O'CONNOR, DEFENDANT IN ERROR.

ADDITIONAL AUTHORITIES CITED IN THE ARGUMENT FOR DEFENDANT IN ERROR.

Payment of a demand which can only be enforced by the decision of a court of justice is voluntary.

Maxwell *vs.* San Luis Obispo, 71 Cal., 466.
Southern Ry. Co. *vs.* Mayor, 141 Ala., 493.
Betts *vs.* Village, 93 Mich., 77.
C. & J. Michel Brewing Co. *vs.* State, 19 S. D., 302.

If the law furnishes adequate protection payment of what is demanded is voluntary.

30 Cyc., 1311, and cases cited; page 15, defendant in error's brief.

The plaintiff was protected by right to an injunction.

Western Union Tel. Co. *vs.* Andrews, 216 U. S., 165.

The forfeiture of right to do business was not self-executing.

Matter of N. Y. & L. I. Bridge Co., 148 N. Y., 540, 547.

Frost *vs.* Frostburg Coal Co., 24 Howard, 278, 283.

Galveston, etc., Ry. Co. *vs.* The State, 81 Tex., 572, 595.

Briggs *vs.* Canal Co., 137 Mass., 71.

ARCHIBALD A. LEE,
Counsel for Defendant in Error.